Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

CONTECH DIVISION, SPX CORPORATION,

*Petitioner,*

*v.*

NATIONAL LABOR RELATIONS BOARD, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does it violate an employer's First Amendment rights for the NLRB to overturn the results of a union election based upon the employer's statements to its employees during the campaign where those statements are permitted under 29 U.S.C. § 258(c)?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties listed in the caption, the respondents include International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

Petitioner, Contech Division, SPX Corporation is a division of SPX Corporation which is a publicly traded corporation.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Parties to the Proceeding and Rule 29.6 Statement | ii |
| Table of Contents | iii |
| Table of Cited Authorities | iv |
| Table of Appendices | vi |
| Citations of Reports of Opinions and Order Below | 1 |
| Statement of Jurisdiction | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Concise Statement of the Case | 3 |
| Reasons for Granting the Writ | 7 |
| Conclusion | 19 |

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Associated Roofing & Sheet Metal Co., Inc.*, 255 NLRB 1349 (1981) ..... 8

*Diner's Drive-In, Inc.*, 280 NLRB 971 (1986) .... 8

*Honeywell, Inc.*, 225 NLRB 617 (1976) ..... 8

*Mohawk Bedding Company*, 204 NLRB 277 (1973) ..... 8

*NLRB v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575 (1969) ..... 5, 6, 8

*NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir. 1967) ..... 8

*The McLaughlin Company*, 187 NLRB 897 (1971) ..... 8

*Turner Shoe Company, Inc.*, 249 NLRB 144 (1980) ..... 8

*US Airways, Inc. v. National Mediation Board and Communications Workers of America, AFL-CIO*, 1999 WL 335366 at 4 (DC Cir. 5/28/99) ..... 9, 10

*Warren W. Parke*, 219 NLRB 546 (1975) ..... 8

*Cited Authorities*


| | *Page* |
|---|---|
| **Statutes:** | |
| 28 U.S.C. § 1254(1) | 2 |
| 29 U.S.C. § 151 *et seq.* | 2 |
| 29 U.S.C. § 158(a)(1) | 3 |
| 29 U.S.C. § 158(a)(5) | 3 |
| 29 U.S.C. § 158(c) | *passim* |
| 29 U.S.C. § 158(c)(5) | 3 |
| 29 U.S.C. § 160(e) | 4 |
| 29 U.S.C. § 160(f) | 4 |
| 29 U.S.C. § 258(c) | i |
| **United States Constitution** | |
| First Amendment | i, 2, 5, 10 |
| **Rules:** | |
| United States Supreme Court Rule 10(a) | 7 |
| United States Supreme Court Rule 10(c) | 7 |

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated Decided And Filed December 30, 1998 ..... 1a

Appendix B — Decision And Direction Of Second Election Of The National Labor Relations Board Dated December 19, 1995 ..... 22a

Appendix C — Regional Director's Report And Recommendation Of The National Labor Relations Board For The Seventh Region On Objections To Conduct Affecting The Results Of The Election Dated April 2, 1996 ..... 60a

Appendix D — Order Of The United States Court Of Appeals For The Sixth Circuit Denying Petition For Rehearing Dated And Filed March 11, 1999 ..... 68a

Appendix E — Hearing Officer's Report And Recommendations Of The National Labor Relations Board For The Seventh Region On Objections Dated April 17, 1995 ..... 70a

Appendix F — Excerpts From Trial Transcript Of Robert Davis ..... 108a

Appendix G — Excerpts From Trial Transcript Of Joseph Barry ..... 112a

*Appendices*


| | *Page* |
|---|---|
| Appendix H — Excerpts From Trial Transcript Of James Rank | 126a |
| Appendix I — Excerpts From Trial Transcript Of Ila Aurand | 128a |
| Appendix J — Excerpts From Trial Transcript Of Danny Truelove | 132a |
| Appendix K — Excerpts From Trial Transcript Of James Humphries | 134a |
| Appendix L — Excerpts From Trial Transcript Of Brad Farver | 136a |
| Appendix M — Excerpts From Trial Transcript Of Gary Walker | 141a |
| Appendix N — Excerpts From Trial Transcript Of Paul Brancaleon | 144a |
| Appendix O — Excerpts From Trial Transcript Of Robert Davis | 146a |
| Appendix P — Excerpts From Trial Transcript Of Shirley Stroud | 147a |
| Appendix Q — Memo Dated November 21, 1994, Exhibit J4WW | 149a |
| Appendix R — Excerpts From Supply Agreement Dated July 15, 1991, Exhibit J4ZZ | 151a |

## CITATIONS OF REPORTS OF OPINIONS AND ORDER BELOW

1. The Hearing Officer's Report and Recommendations on Objections of the National Labor Relations Board, Seventh Region, was filed on April 17, 1995 (Pet. App. 70a).

2. The Decision and Direction of Second Election of the National Labor Relations Board was filed on December 19, 1995, and is reported at 320 N.L.R.B. No. 52 (Pet. App. 22a).

3. The Regional Director's Report and Recommendation on Objections to Conduct Affecting the Results of the Election, of the National Labor Relations Board, Seventh Region, was filed on April 2, 1996 (Pet. App. 60a).

4. The Decision and Certification of Representation of the National Labor Relations Board was filed on August 5, 1996 (Pet. App. 40a).

5. The published decision of the panel of the Court of Appeals for the Sixth Circuit was filed on December 30, 1998, and is reported at 164 F.3d 297 (Pet. App. 1a).

6. The Order of the Court of Appeals for the Sixth Circuit denying rehearing with suggestion for rehearing *en banc* was filed on March 11, 1999 (Pet. App. 68a).

## STATEMENT OF JURISDICTION

Petitioner seeks review of a published Opinion of the United States Court of Appeals for the Sixth Circuit in a case involving the interpretation and application of the National Labor Relations Act, 29 U.S.C. § 151 *et seq*. The panel decision was filed on December 30, 1998, and is reported at 164 F.3d 297 (6th Cir. 1998) (Pet. App. 1a). The Order denying rehearing with suggestion for rehearing *en banc* was filed on March 11, 1999. This Petition for Certiorari is filed within the 90 days of that March 11, 1999 Order. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the final judgment or decree of the Court of Appeals for the Sixth Circuit.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the following constitutional and statutory provisions:

1. The First Amendment of the United States Constitution, U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5):

> It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

3. Section 8(c)(5) of the National Labor Relations Act, 29 U.S.C. § 158(c)(5):

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

## CONCISE STATEMENT OF THE CASE

This case involves employer free speech during a union organizing campaign. In a Board sponsored election, employees of the Petitioner, Contech Division, SPX Corporation ("Contech"), voted against union representation by a vote of 196 to 154. The union objected to certain of

Contech's campaign statements. The Board overturned that election because of what Contech's representatives said during the election campaign even though employer's speech was lawful under Section 8(c) of the National Labor Relations Act ("NLRA") (29 U.S.C. § 158 (c)) and protected by the First Amendment of the United States Constitution.

After a second election where the employees voted in favor of union representation by a vote of 184 to 150, Contech refused to bargain with the UAW because it believed that the first election was improperly overturned in violation of its right to free speech. Contech was charged with unfair labor practices for refusing to bargain. The Board upheld those charges and ordered Contech to bargain.

Contech timely filed a petition for review by the United States Court of Appeals for the Sixth Circuit. That Court had jurisdiction over the petition pursuant to Section 10(f) of the NLRA, 29 U.S.C. § 160(f). The Board filed a cross-application for enforcement of its final order. The Sixth Circuit had jurisdiction over that cross-application under 10(e) of the NLRA, 29 U.S.C. § 160(e). The Sixth Circuit enforced the Board order. Contech timely filed this Petition for Writ of Certiorari.

The cornerstone of the National Labor Relations Act ("NLRA or the "Act") is the protection of the employees' right to join or not to join a labor organization. Practically, employees make that choice in the context of union organizing campaigns that occur in workplaces throughout the United States on a daily basis. There were over 217,000 elections in 1997 alone. An election is initiated generally through the filing of a petition for an election by a union, after which an election date is set by the National Labor

Relations Board ("NLRB") — generally no further than 42 days from the filing of that petition for election. During this short time period, employees have been bombarded by the union and by the employer with facts, propaganda, opinions, stories, videos and meetings that tell them why they should or should not join a particular union. Unlike general elections, in union elections typically 95% or more of the employees vote.

In making this critical decision, employees need the facts from *both* sides. If employees are allowed to hear only one side of the story, only that side of the story will prevail.

Fortunately, Congress and this Court have long recognized that employer free speech is not lost in an election. Congress recognized it in passing Section 8(c) of the NLRA, 29 U.S.C. § 158(c), which states in pertinent part:

> The expressing of any views, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this chapter, if such expression contains no threat of reprisal or force or promise of benefits.

The United States Supreme Court in *NLRB v. Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 617 (1969), explained that Section 8(c) is grounded in the First Amendment's protection of the employer's right to free speech and represents in effect a safe harbor created by Congress for employer statements during an organizational campaign:

> But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by the union or the Board. Thus, Section 8(c) (29 U.S.C. § 158(c)) merely implements the First Amendment by requiring that the expressions of "any views, argument or opinion" shall not "be evidence of an unfair labor practice," so long as such expression contains "no threat of reprisal or force or promise of a benefit" in violation of § 8(a)(1).

The Court noted that under Section 8(c) an employer could state his views as long as there were no "threats or reprisal" and went on to describe the parameters for predictions about the future:

> He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization.

*Gissel*, 395 U.S. at 618.

In this case, Contech fully complied with Section 8(c) in its statements during the union election campaign. It informed its employees of what it saw as the negative consequences of a union. It did not threaten its employees. It did not promise them a benefit. No unfair labor practice

charge was filed against it for its comments. Nevertheless, the Sixth Circuit held that the Board could overturn the election anyway holding that Section 8(c) only protects an employer against an unfair labor practice charge, but does not limit the NLRB's right to overturn an election based upon employer comments which are not an unfair labor practice:

> Because Section 8(c) only applies to unfair labor practice charges, Contech's assertion that it effectively precludes the Board from setting aside the first election is without merit. The Board may set aside on election even though an employer's conduct does not use to the level of an unfair labor practice. See *Tennessee Packers*, *supra*, 379 F.2d at 181.

*Contech Division, SPX Corporation v. N.L.R.B.*, 164 F.3d 297 (6th Cir. 1998) (Pet. App. at 18a).

## REASONS FOR GRANTING THE WRIT

This case is appropriate for consideration by this Court based upon Rule 10(a) and (c) of the Rules of the Supreme Court of the United States Under Rule 10(a), a factor for this Court to consider is whether a:

> United States court of appeals has entered a decision in conflict with decision of another United States court of appeals on the same important matter.

Rule 10(c) states that another factor for the Court to consider is whether:

> a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . .

The Sixth Circuit's decision holding that the NLRB may overturn an election based upon employer statements that do not violate Section 8(c) and are protected by the first amendment raises an important issue of federal law which has not been and should be settled by this Court. The Sixth Circuit cited *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir. 1967), for the principle that an election can be overturned where a party's conduct interferes with the freedom of choice in an election even though the conduct does not constitute an unfair labor practice, but *Tennessee Packers* did *not* involve conduct protected by Section 8(c). It certainly does not stand for the proposition that the Board can overturn an election simply because the employer exercised its right to free speech.

In past cases where parties have objected to employer statements during an election but have not filed unfair labor practice charges, the Board itself has used Section 8(c) for analyzing the validity of the objection. *Diner's Drive-In, Inc.*, 280 NLRB 971 (1986); *Associated Roofing & Sheet Metal Co., Inc.*, 255 NLRB 1349 (1981); *The McLaughlin Company*, 187 NLRB 897 (1971); *Honeywell, Inc.*, 225 NLRB 617 (1976); *Turner Shoe Company, Inc.*, 249 NLRB 144 (1980); *Mohawk Bedding Company*, 204 NLRB 277 (1973); *Warren W. Parke*, 219 NLRB 546 (1975). Indeed, in its brief to the Sixth Circuit in this case, the Board argued that its decision complied with *Gissel*, which interpreted Section 8(c), rather than arguing that Section 8(c) did not apply. (NLRB Final Brief at 15-17).

If the Sixth Circuit's decision is allowed to stand, an employer's right to free speech in a union election campaign will be gone. Section 8(c), the past guideline for analyzing employer's comments, will be irrelevant. The NLRB can simply set aside elections when the employer make statements which comply with Section 8(c). The fact that the statements cannot be used as evidence of an unfair labor practice charge makes no practical difference. The result is the same. The Board can overturn the election. Since the employer has no standard for analyzing what it can say, it is at risk of an overturned election if it says anything at all. A decision which has such significant implications warrants review by this Court.

Further, the decision in this case conflicts with the recent decision of the District of Columbia Court of Appeals in *US Airways, Inc. v. National Mediation Board and Communications Workers of America, AFL-CIO*, 1999 WL 335366 at 4 (DC Cir. 5/28/99). In *US Airways, Inc.*, the Court reversed a United States District Court decision which rejected US Airways' claim that the National Mediation Board had violated its first amendment rights by limiting US Airways' comments during a union election campaign. Although the case arose under the Railway Labor Act, the D.C. Circuit rejected the argument that the first amendment analysis would be different under that act; holding:

> In short, the Board provides us with nothing to support its claim that the key characteristic of representation elections identified by the Gissel Court as mandating lesser-than-usual First Amendment protection of employers' expression — the economic dependence of employee on

> employer — should be thought of differently when that employer is a carrier governed by the RLA.

The D.C. Circuit then set aside a rerun election because it found that the National Mediation Board ("NMB") had interfered with the employer's first amendment rights by telling the employer in advance what it could not say or do during the representation campaign. In particular, the Court found that NMB had acted improperly in prohibiting the employer from predicting that if the union was elected the employer could no longer use its employee roundtable groups. The Court held:

> To be sure, U.S. Airways might have explained more precisely just what it was about the roundtables that was inconsistent with union representation. "But if unions are free to use the rhetoric of Mark Antony while employers are limited to that of a Federal Reserve Board chairman, . . . the employer's speech is not free in any practical sense." Crown Cork, 36 F.3d at 1140 (holding protected an employer's prediction that unionization would increase costs, risking the loss of cost-sensitive projects and consequent layoffs, notwithstanding employer's failure to emphasize that the loss of such projects was only a risk and not an absolute certainty).

(*Id.* at 7).

The *US Airways* decision recognizes that an employer's First Amendment rights are protected by Section 8(c) and

an employer has a right to predict the impact of a union election. The Sixth Circuit decision in this case says the opposite. This issue needs to be resolved by this Court.

Perhaps sensing the confusion and potentially disastrous effects of its sweeping ruling, the Sixth Circuit attempted to justify the ruling by stating that it would have reached the same result even if Section 8(c) applied, holding:

> Furthermore, even if we were to apply Section 8(c)'s language to the election context, we note that the employer's expression of its views is protected only "if such expression contains no threat of reprisal. . . ." Where Contech crossed the line in the present case is not its use of the handouts, posters, and newspaper articles showing job losses elsewhere that Contech attributed to union representation, but in the linking of such literature to its own intimidating conduct in transferring production of the Ford part to another Contech plant without explanation, in its timing of the quality — inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials. The Board in effect concluded that Contech's overall conduct contained the threat of reprisal, thus denying the employees a free and fair election choice.

*Contech Division, SPX Corporation v. NLRB*, 164 F.3d 297 (6th Cir. 1998) (Pet. App. at 18a-19a).

There are two flaws with this rationalization. First, it does not change the fact that the Sixth Circuit has adopted a sweeping rule for that Circuit which chills an employer's first amendment right to express its opinion. If the panel believed Section 8(c) was violated, it did not need to make the sweeping ruling that Section 8(c) does not apply to objections to election.

Second, in analyzing that the NLRB "in effect" concluded that Contech violated 8(c), the Sixth Circuit ignored the fact that there was no evidence in the record to support that conclusion.

The Sixth Circuit acknowledged that Contech's handout of newspaper articles describing job losses elsewhere in the face of unionization was acceptable. It nevertheless concluded that the Board found the conduct unacceptable because of the transfer of the production of a Ford part to another Contech plant. However, record evidence concerning the transfer does not support the conclusion. Joe Barry testified that the Ford part work was initially "kicked off in our Auburn, Indiana facility." (Joseph Barry, Tr. 300) (Pet. App. at 121a). Auburn is primarily focused on Ford and Ford is very comfortable with "the quality and delivery coming out of Auburn." (Joseph Barry, Tr. 300) (Pet. App. at 121a-122a). However, around March of 1994, the Auburn facility did not have the capacity to do all of Ford's work. Accordingly, Contech asked Ford if it would move the part to Dowagiac. Ford was "very reluctant to have the NM-12 work job sent out of Auburn and sent to Dowagiac." (Joseph Barry, Tr. 300) (Pet. App. at 122a).

To ease Ford's reluctance, Barry promised Ford that the part job would be returned to Auburn "by the end of

1994." (Joseph Barry, Tr. 301) (Pet. App. at 122a). This commitment was made in March, 1994 — more than 8 months before the petition for election was filed. Contech lived up to its commitment and the Ford part job was moved from Dowagiac to the Auburn plant in approximately December of 1994. (Joseph Barry, Tr. 301) (Pet. App. at 123a). There was absolutely no record evidence to conclude that this was a "threat or refusal" in violation of Section 8(c). The Sixth Circuit could not have enforced the Board's decision, except for its conclusion that the Board could overturn the election even if Contech did not violate Section 8(c).

Similarly, there was no evidence for the Sixth Circuit's interpretation that a "threat or reprisal" could be inferred from Contech's "timing of an inspection tour by TRW officials."

In fact, TRW, not Contech, chose the date for the inspection, but both Contech and the panel are limited by the Hearing Examiner finding that it was "not clear who was responsible for the timing of the visit. . . ." (Hearing Officer's Report at 11) (Pet. App. at 91a). In any event, there is no support in the record for the Sixth Circuit's conclusion that it was Contech's timing.

The panel cited Contech's "selective removal of union literature from the plant lunchrooms." However, the record established that the removal was *not* selective. Three supervisors engaged in this practice: Jim Rank, Ila Aurand and Jim Humphrie. Mr. Rank testified that, consistent with his job description, he cleaned the break area before, during and after the union organizing campaign. (James Rank, Tr. 195-196) (Pet. App. at 127a).

Ms. Aurand threw away both union and company literature. Any materials that were scattered about and unattended she discarded. (Ila Aurand, Tr. 230) (Pet. App. at 131a). Like all the other supervisors, Ms. Aurand's job description listed housekeeping as a duty and this is a duty she carried out. (Ila Aurand, Tr. 222-223) (Pet. App. at 128a-130a).

Mr. Humphrie picked up everything that was laying on the tables and threw it in the trash, except for the magazines. (Danny A. Truelove, Tr. 140) (Pet. App. at 132a-133a). Humphrie also testified, uncontroverted, that the mess that he picked up included "company literature, union literature [and] candy wrappers." (James Humphrie, Tr. 319) (Pet. App. at 134a-135a). Truelove testified that after Humphrie threw the union literature in the trash, Truelove went over to the trash can, removed the material from the trash and placed it back on the tables in the break area. (Brad Farver, Tr. 348) (Pet. App. at 139a-140a).

Humphrie testified without contradiction, that housekeeping is part of his job duties and that he cleaned the break areas, before, during and after the union organizing campaign. (James Humphrie, Tr. 319) (Pet. App. at 134a-135a).

Finally, the Sixth Circuit's reference to "the misleading content of certain pre-election statements made by its [Contech's] officials" was not supported by record. TRW is a parts supplier to the big three automobile companies and a customer of Contech. Contech obtained TRW's work as a result of a union strike at another company. (Memo, J-4 WW (Pet. App. at 149a-150a); Gary Walker, Tr. 337 (Pet. App. at 143a); Paul Brancaleon, Tr. 256-257) (Pet. App. at 144a-145a). Contech is now the *sole* source supplier of rack and pinion steering housings for TRW. (Joseph Barry, Tr. 279, 292) (Pet. App. at 112a; 118a-119a). In 1994, TRW

represented approximately 90% of the work in Contech Plant 3 and approximately 15% in Plant 1. (Robert K. Davis, Tr. 266) (Pet. App. at 110a-111a).

TRW and Contech's relationship is governed by a long-term agreement. (LTA) (J-4ZZ) (Pet. App. at 151a-160a). The long term agreement is dated July 15, 1991 and was due to expire on December 31, 1995. It is customary within the industry to renegotiate these long-term agreements far enough in advance (around one year) so that there is sufficient time for the supplier, such as Contech, to have the engineering completed and the proper tools in place to make the parts for the new car models. (Robert K. Davis, Tr. 266) (Pet. App. at 146a).

Joe Barry, Contech Director of Manufacturing, explained that a series of quality and delivery problems had originated in the summer and fall of 1994. (Joseph Barry, Tr. 282, 293-294) (Pet. App. at 113a; 119a-121a). During the months of September, October and November, TRW issued 46 "IRS/PRRS" which are inspection rejects or problem reports. These documents identify parts which left the Dowagiac plant certified as good parts, but which TRW discovered to be defective. Mr. Barry explained that this is a very serious problem. (Joseph Barry, Tr. 293-294) (Pet. App. at 119a-120a).

TRW also considered the union election to be a serious concern. On November 21, 1994, TRW's General Manager, Walt Kneuer telephoned Gary Walker, Contech's Division President, to express his concerns about the problems that TRW was experiencing at the Dowagiac plant. Mr. Walker memorialized this conversation in a memo and noted that Mr. Kneuer had two concerns, one of which was the union election:

His two major concerns are:

1. Why didn't we inform him sooner of the union problem in Dowagiac and the potential threat to production of his parts; and

2. We're two days away from shutting down his customer's product lines in some cases because of current production problems.

(Memo, J-4WW (Pet. App. at 149a); Gary Walker, Tr. 333-334) (Pet. App. at 141a-142a).

Concerned about the quality problems, TRW called a meeting with Contech at TRW headquarters. Mr. Barry, two quality managers and the engineering manager represented Contech in its meeting with TRW, held on November 14, 1994. (Joseph Barry, Tr. 283) (Pet. App. at 114a-115a). TRW expressed its concerns about the poor quality of product that it was receiving from Contech. TRW presented a cracked casting and asked "how could this casting ever get out of your plant?" (Joseph Barry, Tr. 283) (Pet. App. at 114a). TRW demanded to know what Contech was doing to correct those problems and wanted assurances that Contech was putting procedures in effect to contain its problems internally. (Joseph Barry, Tr. 283) (Pet. App. at 114a). Mr. Barry agreed to return on a monthly basis to report what steps Contech was taking. (Joseph Barry, Tr. 285-286) (Pet. App. at 116a-117a).

Because of the critical nature of the quality problems, Mr. Barry and the other members of management held a series of meetings in late 1994, making everyone in the plant

aware of them. (Joseph Barry, Tr. 284) (Pet. App. at 115a). As Mr. Barry explained:

> We had specific plant meetings that, that people came to, specifically in Plant 3 because that's where most of the TRW product was produced. Specifically in that plant, we had those meetings in the break room. We had one meeting per shift. We talked about the critical nature of where we were with TRW, what our concerns were.
>
> We had actually brought home some of those same castings that were presented in the TRW meeting, and we had each of us touch and feel those castings so we all had a good sense of what were those problems, specifically.

(Joseph Barry, Tr. 284) (Pet. App. at 115a).

Despite the serious quality problems that TRW was experiencing with Contech, in November of 1994, Gary Mahon (TRW's Director of Purchasing in America) contacted Robert Davis (Contech's Director of Sales and Marketing) to begin negotiations on an extension of the LTA. (Robert K. Davis, Tr. 263) (Pet. App. at 108a-109a). Sometime between November 14 and November 18, Mr. Davis met with Mr. Mahon. At the beginning of the meeting, Mr. Davis explained to Mr. Mahon that the UAW had petitioned Contech for a vote at the Dowagiac facility. Shortly thereafter, Mr. Mahon informed Mr. Davis that TRW would be postponing negotiations on the LTA until *after* the election. (Robert K. Davis, Tr. 264) (Pet. App. at 109a-110a).

Employee Shirley Stroud testified about statements allegedly made by Mr. Barry and Contech Manufacturing Manager Brad Farver concerning the negotiations of the LTA. Ms. Stroud testified that "the main thing that I remember what Joe [Barry] said about TRW is that they wouldn't sign any more contracts with us and that they didn't want any long-term contract signed until after our election." (Shirley L. Stroud, Tr. 108-109) (Pet. App. at 147a-148a).

Barry and Farver both consistently testified that they made statements about the LTA at a meeting when they introduced the Guardian Glass video. (Joseph Barry, Tr. 303-304 (Pet. App. at 123a-125a); Brad Farver, Tr. 343-345) (Pet. App. at 136a-139a)). It was true that the negotiations of the LTA were suspended because of the union campaign, but Barry and Farver also referenced the quality problems that existed with TRW. (*Id.*).

Quite simply, these statements were not "threats of reprisal." The statements did not violate Section 8(c) and the panel's only basis for enforcing the Board's Order was its decision that Section 8(c) does not protect as employer where there are objections to an election. That sweeping ruling adopts a rule which undermines the employer's first amendment rights. It should be reversed.

## CONCLUSION

For the reasons set forth herein, Contech requests that this Court grant its Petition for Writ of Certiorari and reverse the decision of the United States Court of Appeals for the Sixth Circuit enforcing the NLRB order.

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED DECIDED AND FILED DECEMBER 30, 1998**

# UNITED STATES COURT OF APPEALS

## FOR THE SIXTH CIRCUIT

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CONTECH DIVISION, SPX CORPORATION,
*Petitioner/Cross-Respondent,*

*v.*

NATIONAL LABOR RELATIONS BOARD,
*Respondent/Cross-Petitioner,*

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,
*Intervenor.*

Nos. 97-5099/5247

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board.
Nos. 7-CA-39061, 7-RC-20485

Argued: March 13, 1998

Decided and Filed: December 30, 1998

*Appendix A*

Before: RYAN, COLE, and GILMAN, Circuit Judges.

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## COUNSEL

**ARGUED:** Peter J. Kok, MILLER, JOHNSON, SNELL & CUMMISKEY, Grand Rapids, Michigan, for Petitioner. Peter Winkler, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. Nancy Schiffer, ASSOCIATE GENERAL COUNSEL, INTERNATIONAL UNION, UAW, Detroit, Michigan, for Intervenor. **ON BRIEF:** Peter J. Kok, MILLER, JOHNSON, SNELL & CUMMISKEY, Grand Rapids, Michigan, David M. Buday, MILLER, JOHNSON, SNELL & CUMMISKEY, Kalamazoo, Michigan, for Petitioner. Peter Winkler, Aileen A. Armstrong, Deborah E. Shrager, NATIONAL LABOR RELATIONS BOARD, APPELLATE COURT BRANCH, Washington, D.C., for Respondent. Nancy Schiffer, Jordan Rossen, ASSOCIATE GENERAL COUNSEL, INTERNATIONAL UNION, UAW, Detroit, Michigan, for Intervenor.

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## OPINION

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RONALD LEE GILMAN, Circuit Judge. This matter arises from the efforts of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("the UAW") to organize the production and maintenance employees ("the employees") of Contech Division, SPX Corporation in Dowagiac, Michigan. After setting aside the results of a certification election in which a majority of the employees voted against UAW representation, the National Labor Relations Board ("the Board") ordered a new election in which the UAW prevailed. The Board

subsequently certified the results of the latter election and designated the UAW as the exclusive collective-bargaining representative of the employees.

Upon Contech's refusal to bargain with the UAW, the Board charged Contech with a violation of Sections 8(a)(1) and (5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1) and (5), and issued an order directing that Contech bargain on request with the UAW. Contech now petitions for review of that order, and the Board brings a cross-application to enforce the same. Contech asserts that the Board improperly set aside the results of the first election and also improperly certified the results of the second election. We are satisfied, however, that substantial evidence supports each of the Board's decisions in question. Accordingly, we **DENY** Contech's petition for review and **GRANT** the Board's cross-application for enforcement of its order.

## I. BACKGROUND

Contech, a parts manufacturer for TRW, Ford Motor Company, and other automotive suppliers, operates two plants in Dowagiac, Michigan ("Plant 1" and "Plant 3") and a plant in Auburn, Indiana. SPX Corporation, Contech's parent company, operates a plant in Muskegon, Michigan.

In November of 1994, the UAW filed a petition for a Certification of Representative ("the representation petition") with the Board, indicating that "a substantial number of [the] employees wish to be represented for purposes of collective bargaining by [the UAW] and [the UAW] desires to be certified as representative of the employees." Pursuant to a Stipulated Election Agreement, a certification election was scheduled for January 12, 1995. During the pre-election campaign, Contech engaged in conduct that prompted the Board to set aside the results of the election. The specific nature and effect of that conduct, as found by the Board, is set forth in detail below.

*Appendix A*

## A. The First Election

On November 17, 1994, three days after the UAW filed the representation petition, the employees received a letter from Dwayne Weber, Contech's Human Resources Manager. Weber stated in the letter that over two-thirds of the 600 plants that had closed in Michigan over the past two decades had union work forces.

The employees also received a handout containing a reprinted newspaper article addressing Ford's removal of manufacturing dies from an Indiana plant where employees were on strike. The following statements from the article were emphasized in the margins of the reprinted pages: "DIES OWNED BY FORD MOTOR COMPANY," and "THE DIES WOULD HAVE STAYED AT THE PLANT ANOTHER FOUR YEARS IF THE STRIKE HAD NOT OCCURRED." The handout noted that the UAW was the union involved in the article. Another Contech handout contained a reprint of a 1982 letter in which a Contech customer informed Contech's general manager that it had "closed its doors . . . due to union difficulties." On the back page of both of the above handouts, the following message appeared in large print: "SAY NO TO THE POSSIBILITY OF LOST CUSTOMERS, LOST JOBS, LOST PAY, LOST BENEFITS, AND OTHER TROUBLES--VOTE NO."

In late December, Contech transferred the production of the MN-12, a Ford part, from Plant 3 in Dowagiac, Michigan to the plant in Auburn, Indiana. Contech did not provide any explanation to the employees for making this transfer.

Several days after the UAW filed the representation petition, Robert Davis, Contech's Director of Sales and Marketing, met with Gary Mahon, TRW's Director of Purchasing. The purpose of the meeting was to negotiate a renewal of their contract for the manufacture of TRW's rack-and-pinion steering housings, the production of which constituted about 15% of the output of Plant 1 and 90% of

*Appendix A*

Plant 3. At the meeting, Mahon informed Davis of TRW's desire to postpone contract-renewal negotiations "until [Contech's] union representation issue as well as some longstanding quality and delivery issues between [Contech] and TRW were resolved."

In a December speech, Contech's Director of Manufacturing Joe Barry indicated to the employees that TRW would not renew its contract with Contech until after the election. In a separate speech, Brad Farver, Contech's Manufacturing Manager, referred to a letter from TRW to Contech in which TRW purportedly communicated a concern about Contech becoming unionized. Farver, however, declined to elaborate when asked by the employees to explain why TRW would not want to deal with Contech in the event that Contech became unionized. Moreover, Contech did not explain to the employees that product quality and delivery issues were contributing factors in TRW's hesitancy at entering into a long-term renewal contract.

Also in December, Contech showed its employees a video depicting strike violence. At that meeting, Barry and Farver discussed with them the status of the TRW contract-renewal negotiations. Barry stated that "negotiations had been suspended 'until we got some of our problems behind us.'" Farver stated that "TRW had postponed long-term agreements 'until our issues are resolved.'"

During the two weeks preceding the election, Contech displayed large poster photographs of closed manufacturing plants. These posters remained on display until immediately before the election. On January 10, 1995, two days before the election, Contech distributed a handout signed by Weber explaining that the closed plants pictured in the posters "were in Michigan and were now closed, that all of the employees who had worked in those plants were now laid off, many permanently, and that in each instance the laid off employees had been represented by a union." The handout also provided that since 1987, there had been a reduction of almost 400

UAW jobs at SPX's Muskegon, Michigan plant. Moreover, the handout stated that within that past year, 105 union jobs were lost when SPX closed its Ravenna, Michigan plant because of "ineffective operation." Weber's note concluded: "A UNION DOES NOT PROVIDE JOB SECURITY." In the interim, Mark Hunsberger, a Contech Supervisor, stated to "at least three or four employees individually" that TRW had sent one of its dies to another company to determine whether that company could produce the part.

On January 9, 1995, three days before the first election, Al Zagotta, Contech's President, sent a letter to the employees. In the letter, Zagotta explained that Contech was in a "very critical stage in its relationship with certain key customers like TRW, Ford, and Saginaw." Zagotta's letter continued as follows:

> I am concerned that if the Dowagiac plant develops a reputation for not being a dependable supplier--because of labor problems, a UAW-led strike, or even the possibility of a strike every time the contract comes up for renewal--our customers may become nervous and look elsewhere for another source for their parts.

On January 10, 1995, two days before the election, Gary Walker, a Division Manager of Contech, spoke to the employees. He stated that Contech was "greatly concerned about the impact the union could eventually have on our customers like TRW and our ability to compete." He also referred to what he termed as the "horrendous strike record of the UAW," "the [hundreds] of closed plants in Michigan and the hundreds of thousands [of] UAW members who lost their jobs . . . as a result of inefficient operation and UAW-led strikes." Furthermore, Walker shared his observation that "the UAW is always at the heart of conflict." He also discussed three unionized SPX plants in Western Michigan that "were either partially or totally shut down because they were allegedly no longer competitive."

*Appendix A*

During January 9 and 10, the same two-day period that Zagotta and Walker made the above statements to the employees, Jack Fannon, TRW's Quality Representative, made a thorough inspection tour of Contech's two Dowagiac facilities, accompanied by an entourage of Contech managers and supervisors--all of which was highly visible to the employees.

Finally, Contech's supervisors at both Plant 1 and Plant 3, on all three shifts, regularly discarded UAW literature left in the respective lunchrooms of the plants. Those supervisors, however, did not disturb current newspapers, magazines, and Avon booklets.

An election by secret ballot was conducted on January 12, 1995 ("the first election"). The results of the first election were as follows: 154 votes in favor of UAW representation, 196 votes against UAW representation, and four challenged ballots, a number insufficient to affect the results.

The UAW subsequently filed six objections to the first election. Specifically, the UAW alleged that Contech and its agents: (1) conducted a "campaign of fear and intimidation through predictions of violence, strikes, loss of customers and economic detriment which they insinuated would inevitably result from a union victory," (2) made "pro-company campaign insignia available to employees, thereby forcing the employees to make known their pre-election preferences," (3) threatened to "go out of business, close the plant or that customers would remove work if [the UAW] won the election," (4) created "the impression of futility by stating that [Contech] would not bargain in good faith if [the UAW] won the election," (5) confiscated "union literature," and (6) conducted the election "in an area used by [Contech] to propagandize employees."

A Hearing Officer of the Board thereafter conducted a hearing on UAW's six objections. In April of 1995, the Hearing Officer issued a report recommending that the Board

sustain the part of Objection 1 concerning Contech's predictions of customer loss as an inevitable result of union victory, and all of Objections 3 and 5. Contech subsequently filed exceptions to the Hearing Officer's report.

In December of 1995, the Board adopted the Hearing Officer's recommendations in a Decision and Direction of Second Election, concluding that "parts of [Contech's] speeches, statements, and other communications had a reasonable tendency to create and reinforce an atmosphere of fear among the employees that a union victory could result in loss of work, jobs, and customers, and in-plant closure." The Board further found "no objective factual evidence to support [Contech's] implication to [the] employees that [its] customers 'become nervous' as a result of the mere presence of a union."

In support of its conclusions, the Board found that: (1) although Contech normally would have informed the employees as to why production of a part was leaving Plant 3, it issued no explanatory communication upon the removal of the Ford MN-12 production from the plant. In the absence of such an explanation, the reprinted newspaper article concerning Ford's removal of dies from the Indiana plant "took on added significance for the employees," and would tend to suggest that the removal of MN-12 production was related to the UAW's presence, (2) Hunsberger's statement that TRW had sent one of its dies to another company "would have been widely disseminated throughout the unit," (3) the comments of Barry and Farver concerning the postponement of negotiations with TRW, along with Hunsberger's statement that TRW had sent one of its dies to another company, "would reasonably lead the employees to conclude that TRW's relationship with [Contech] was in jeopardy because of [the UAW], and that the outcome of the first election could determine whether the TRW contract was renewed," (4) "in the context of the statements of Barry, Farver, and Hunsberger, which gave the employees reason to believe that TRW and Ford were already retreating from their relationship

with [Contech] because of [the UAW], Walker's statements in his January 10 speech had a reasonable tendency to make the employees fearful that a union victory could result in loss of work for [Contech]," (5) the impression conveyed to the employees by the comments of Barry, Farver, and Hunsberger was further amplified by Fannon's highly visible quality-inspection tour (just several days before the election), which in turn (a) gave additional weight to Zagotta's concern that Contech's customers would become nervous about the UAW's presence, and (b) provided additional context for Walker's concern that Contech's relationship with TRW "would be affected by the outcome of the election," and (6) the end-of-campaign statements of Zagotta and Walker "would reasonably have been understood by [the employees] as an implicit prediction that work and jobs would be lost if [the UAW] won the election."

Finding that these circumstances reasonably tended to create an impression that a UAW victory would result in harm to the employees, the Board set aside the results of the first election and directed that a second election be conducted.

**B. The Second Election**

Prior to the second election, the employees received a series of open letters from the UAW. Contech subsequently argued that these letters misled the employees and thus warranted setting aside the results of the second election.

In one such letter ("the UAW letter"), the UAW described Contech's actions and the Board's findings regarding the first election as follows:

> The National Labor Relations Board (NLRB) has found that your employer engaged in objectionable conduct during your union representation election last year when management blatantly misled you about customer concerns and loss of jobs. The NLRB report makes it clear that the company set out from the start of their anti-union campaign last year until right up to the election to

deliberately misconstrue events and customer actions. It's also clear that they fully intended and planned to threaten, intimidate and coerce employees by their actions. Top management officials were involved in these unsavory illegal objections against you.

* * *

Your employer *should* allow you to vote this time without being subjected to company intimidation, coercion and threats. Out of desperation management may use tactics similar to those they used last time but they will probably attempt to be more devious in an attempt to cover up. If you see tactics that you feel may be threatening, intimidating and thus illegal, feel free to call the UAW for assistance and protection.

Lee Hodge, President of UAW Local 1218, then sent the employees the following letter ("the Hodge letter"):

My wife has worked at Contech for over 20 years. With that thought in mind, I want to reassure each and every one of you that I have never, nor will I ever, lie or try to deceive you concerning the upcoming vote for the UAW. But, I cannot say the same for your Contech management. They have spread false rumors of your plant moving, and of losing Ford and TRW work. They have threatened and coerced Contech workers during your last election for the UAW, and their misrepresentation of the facts were [sic] proven by the National Labor Relations Board (NLRB). The reason you are allowed to vote again at this time is because the NLRB felt that Contech workers deserved another vote because of company lies and distortions during your last election.

* * *

The National Labor Relations Board has found Contech guilty of giving you untrue information regarding customer intentions. We have a copy of this NLRB document at our office, and it can be read by anyone who wishes.

*Appendix A*

Phil Dubensky of Ford Motor Company also sent the following letter to the UAW ("the Ford letter"), dated and distributed one day before the second election, addressing the suggestion that Ford would withdraw its business if the UAW prevailed:

> This is pursuant to your inquiry of March 8, 1996 regarding SPX-Contech and the assertion that its Plant Manager in the past has advised employees that if the current UAW organizing effort is successful, Ford will "pull" its business.
>
> Ford's longstanding policy is *not* to become involved, in any way, with UAW organizing efforts that may be initiated within the supplier community. Furthermore, the Company's decision to source product to a particular supplier, or remove product from a current supplier, is based on numerous criteria. Removal of a product, simply because employees of a supplier elect to join the UAW, is definitely *not* Ford Motor Company's policy. Representations to the contrary would be without foundation.

Finally, UAW's in-house organizing committee issued a letter ("the committee letter"), which was posted on Contech's bulletin board. It read as follows:

> The management HAS the kind of benefits that we would like to have. Their pension plan is also much better than ours. . . . [The] management can't see why we need a Union. Have you noticed that the supervisors are Not trying to Talk us out of voting YES this time? They are the ones that used to be in the position we are in. They can relate to our fears of having little or nothing after many years of dedicated service.

A second election by secret ballot was conducted on March 13, 1996 ("the second election"). The results of the second election were as follows: 184 votes in favor of UAW

representation, 150 votes against UAW representation, and 16 challenged ballots, a number insufficient to affect the results.

Contech subsequently filed four objections to the second election, each of which pertained to the foregoing letters. Specifically, Contech alleged that the UAW, its employees, agents, and others acting on its behalf: (1) falsely informed the employees within one day of the second election that Contech "had made misrepresentations to them that one of its customers would 'pull its business'" (2) implied that unless the UAW "were chosen as the bargaining representative, a significant customer would remove its business from the plant," (3) misrepresented to the employees "the nature of the findings in the previous objection proceeding," and (4) informed the employees that "front line supervisors favored the UAW, and thereby implied that retaliatory action would be taken against them if they did not vote in favor of [the UAW]."

In April of 1996, the Regional Director of the Board ("the RD"), without conducting a hearing, issued a report recommending that Contech's objections be overruled in their entirety and that a Certification of Representative issue. In disposing of the first three of Contech's objections, which arise from purported misrepresentations contained in the UAW letter, the Hodge letter, and the Ford letter, the RD relied primarily upon *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. 127 (1982). In *Midland*, the Board held as follows:

> [W]e rule today that we will no longer probe into the truth or falsity of the parties' campaign statements, and that we will not set elections aside on the basis of misleading campaign statements. We will, however, intervene in cases where a party has used forged documents which render the voters unable to recognize propaganda for what it is. Thus, we will set an election aside not because of the substance of the representation, but because of the deceptive manner in which it was made, a manner which renders employees unable to

> evaluate the forgery for what it is. . . . [W]e will continue to protect against other campaign conduct, such as threats, promises, or the like, which interferes with employee free choice.

*Id.* at 133 (footnotes omitted). The RD found that under *Midland*, the letters in question were not sufficiently deceptive to warrant Board action.

As to the fourth of Contech's objections, which was based upon the committee letter, the RD concluded that Contech "has failed to establish that, in fact, its supervisors engaged in pro-union conduct." It further stated that the letter would not reasonably cause employees to "be misled into believing that [Contech] favored unionization."

Contech subsequently filed exceptions to the RD's report. Upon review of the RD's report and Contech's exceptions thereto, the Board adopted the RD's findings and recommendations, and issued the UAW a Certification of Representative accordingly. In analyzing Contech's exception to the RD's reliance upon *Midland*, the Board looked to *Van Dorn Plastic Machinery Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), in which this court held that misrepresentations may serve as the basis to set aside an election if they are "so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." *Id.* at 348. The Board then determined that the present matter "is not a case of pervasive misrepresentation or artful deception." At most, the Board found, the UAW "has mischaracterized the precise rationale for the Board's decision to set aside the results of the election."

### C. The Board's Order

Notwithstanding the Board's issuance of a Certification of Representative to the UAW, Contech refused to comply with the UAW's requests to meet for the purpose of negotiating a collective-bargaining agreement. The UAW responded by

filing an unfair labor practice charge against Contech in October of 1996.

The General Counsel of the Board followed up by filing a complaint against Contech, alleging that Contech's refusal to bargain with the UAW constituted a violation of Sections 8(a)(1) and (5) of the Act. In its answer, Contech acknowledged its refusal to bargain with the UAW, but attacked the validity of the Board's certification of the UAW as the exclusive collective-bargaining representative of the employees. In November of 1996, the General Counsel filed a motion for summary judgment. The Board ultimately granted that motion in a Decision and Order entered on December 9, 1996. The Board's order directs that Contech, among other things, cease and desist from refusing to bargain with the UAW.

**D. The Present Applications**

Contech subsequently filed the present petition for review of the Board's order. In response, the Board filed a cross-application for enforcement of the order. In March of 1997, this court granted UAW's motion to intervene in the present matter.

In support of its petition, Contech asserts that the Board improperly: (1) set aside the results of the first election and ordered a second election, (2) overruled Contech's objections to the second election, and (3) issued the UAW a Certification of Representative with respect to the employees. Moreover, Contech asserts that the Board should have conducted a hearing with regard to its objections to the second election. Contech, however, made no request for such a hearing when filing those objections. Furthermore, Contech did not raise this contention before the Board. In light of Contech's failure to demonstrate the existence of extraordinary circumstances that would excuse it from not raising the lack of a hearing before the Board, we shall not consider this contention on appeal. *See* 29 U.S.C. 160(e) ("No objection that has not been

urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.").

## II. ANALYSIS

### A. Standard of Review

We begin by noting that "Congress has vested the Board with considerable discretion in supervising and regulating representation elections." *NLRB v. Tennessee Packers, Inc.*, 379 F.2d 172, 180 (6th Cir. 1967). In an effort "to assure employees the greatest freedom of choice in the selection of their representatives," the Board strives to conduct representation elections "in an atmosphere in which employees are free from pressure, coercion and undue influence from either the employer or the union." *Id.* When a party's pre-election conduct unduly influences the result of an election, "the Board has set aside such election and ordered a new one." *Id.*

A party seeking to overturn the results of a representation election bears "the burden of showing that the election was not conducted fairly." *NLRB v. Superior Coatings, Inc.*, 839 F.2d 1178, 1180 (6th Cir. 1988). In order to satisfy its burden, the objecting party must demonstrate that "unlawful conduct occurred which interfered with employees' exercise of free choice to such an extent that it materially affected the result of the election." *NLRB v. Shrader's, Inc.*, 928 F.2d 194, 196 (6th Cir. 1991). On the other hand, for the Board to set aside the results of an election, "[i]t is not necessary that conduct which interferes with the freedom of choice in an election actually constitute an unfair labor practice." *Tennessee Packers*, 379 F.2d at 181.

Because we afford the Board "broad discretion to determine whether the circumstances of an election have allowed the employees to exercise free choice in deciding whether to be represented by a union," *NLRB v. Duriron Co.*, 978 F.2d 254,

256-57 (6th Cir. 1992), "[t]he Board's findings with respect to whether an election reflected the 'free and fair choice' of the employees 'will not be disturbed on appeal where there is substantial evidence ... to support its conclusions." *NLRB v. Dickinson Press Inc.*, 153 F.3d 282, 285 (6th Cir. 1998) (quoting *Mitchellace, Inc. v. NLRB*, 90 F.3d 1150, 1155 (6th Cir. 1996)). The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Accordingly, we may not displace the Board's reasonable inferences "even though [we] might justifiably have reached a different conclusion had the matter been before [us] *de novo*." *Tony Scott Trucking, Inc. v. NLRB*, 821 F.2d 312, 313 (6th Cir. 1987).

**B. The First Election**

We are satisfied that substantial evidence supports the Board's determination that the circumstances surrounding the first election did not allow the employees to exercise a free and fair choice in deciding whether to be represented by the UAW. The Board's determination was not based on any single incident, but on the totality of the pertinent circumstances discussed in Part I.A. above. The Board concluded that these circumstances "had a reasonable tendency to create and reinforce an atmosphere of fear among the employees that a union victory could result in loss of work, jobs, and customers, and in-plant closure" (citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1969)), and ordered a second election accordingly. In light of the broad discretion afforded the Board "to determine whether the circumstances of an election have allowed the employees to exercise free choice in deciding whether to be represented by a union," *Duriron*, 978 F.2d at 256-57, a reversal of its decision to set aside the results of the first election is unwarranted.

But Contech argues that the record before the Board was devoid of any evidence that Contech's employees were actually intimidated or misled by its conduct. Such proof, however, is unnecessary. *See Dickinson*, 153 F.3d at 286 ("The subjective reactions of employees, like the subjective intent of the alleged wrongdoer, are not dispositive. ... Rather, whether the alleged misconduct was reasonably likely to interfere with employees' free choice depends on objective facts, such as the timing of the allegedly improper act, the capacity of the actor, and similar prior acts.") (internal citation omitted).

Relying primarily upon *NLRB v. Pentre Electric, Inc.*, 998 F.2d 363 (6th Cir.1993), Contech also asserts that the Board improperly set aside the results of the first election because the statements of Contech's representatives were truthful and entitled to protection under Section 8(c) of the Act, 29 U.S.C. § 158(c), which provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, ***shall not constitute or be evidence of an unfair labor practice*** under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

(emphasis added).

Contech posits in its brief that "if the Board's decision is affirmed, employers' free speech will be chilled and they will be restricted from making objective *truthful* statements, if those truthful events can somehow be viewed by the Board or some other third party as somehow scaring employees." In light of the record before us, however, we find Contech's concerns to be unfounded, and conclude that its reliance upon Section 8(c) and *Pentre* to be misplaced.

In *Pentre*, the Board petitioned for enforcement of an order finding that Pentre Electric, Inc. violated Section 8(a)(1) by "making statements to its employees about the effect that

unionization would have on the company during the representation campaign." 998 F.2d at 365. In declining to enforce the order, this court held that the employer's statements were permissible under Section 8(c), stating that "if an employer's statements fall within the scope of [S]ection 8(c) because they contain no threat of reprisal or promise of benefit, no basis exists for finding that the employer has committed an *unfair labor practice*." *Id.* at 368 (emphasis added). Furthermore, *Pentre* held that the Board's burden of demonstrating that an employer has engaged in an unfair labor practice encompasses the burden of demonstrating that "[S]ection 8(c) does not protect an employer's predictions of the consequences of unionization when the employer asserts [S]ection 8(c) as a defense." *Id.* at 371. Accordingly, the court held that the Board erroneously determined that an employer must "produce evidence to corroborate predictions about the effect of unionization to invoke the protection of [S]ection 8(c)." *Id.* at 368.

Unlike *Pentre*, which involved an alleged unfair labor practice arising from an employer's pre-election conduct, the present matter involves the Board's broader discretion to set aside the results of an election. Although the Board ultimately found Contech to be in violation of Sections 8(a)(1) and (5), those charges arose from Contech's refusal to bargain with the UAW after the second election, not from its conduct during the first election. Because Section 8(c) only applies to unfair labor practice charges, Contech's assertion that it effectively precludes the Board from setting aside the first election is without merit. The Board may set aside an election even though an employer's conduct does not rise to the level of an unfair labor practice. *See Tennessee Packers, supra,* 379 F.2d at 181.

Furthermore, even if we were to apply Section 8(c)'s language to the election context, we note that the employer's expression of its views is protected only "if such expression contains no threat of reprisal ...." Where Contech crossed the line in the present case is not its use of the handouts, posters,

and newspaper articles showing job losses elsewhere that Contech attributed to union representation, but in the linking of such literature to its own intimidating conduct in transferring production of the Ford part to another Contech plant without explanation, in its timing of the quality-inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials. The Board in effect concluded that Contech's overall conduct contained the threat of reprisal, thus denying the employees a free and fair election choice. Although this is admittedly a close case, where reasonable minds could reach opposite conclusions on the facts presented, we cannot say that there is an absence of substantial evidence to support the Board's findings. Given the deference to which the Board is entitled within its area of expertise, we therefore decline to disturb the Board's action in setting aside the first election.

**C. The Second Election**

We are also satisfied that substantial evidence supports the Board's determination that the circumstances surrounding the second election allowed the employees to exercise a free and fair choice in deciding to be represented by the UAW. After the second election, Contech filed four objections regarding alleged misrepresentations contained in the letters that the UAW had disseminated to Contech's employees. *See* Part I.B. We agree with the Board's rationale for rejecting each of Contech's objections. *See id.* The Board correctly found that the alleged UAW misrepresentations were not so egregious as to justify setting aside the second election. The governing standard is set forth in *Van Dorn Plastic Machinery, Co. v. NLRB*, 736 F.2d 343 (6th Cir. 1984), in which this court stated as follows:

> There may be cases where no forgery can be proved, but where the misrepresentation is so pervasive and the deception so artful that employees will be unable to

> separate truth from untruth and where their right to a free and fair choice will be affected. We agree with the Board that it should not set aside an election on the basis of the substance of representations alone, but only on the deceptive manner in which representations are made.

*Id.* at 348 (citing *Midland*, 263 N.L.R.B. at 131).

UAW's letters do not include the type of pervasive misrepresentation or artful deception that *Van Dorn* posited would inhibit employees' rights to free and fair choice. Although several of the UAW letters distributed to Contech's employees contained arguably misleading statements, we are satisfied that the Board properly concluded that the employees' right to a free and fair choice was not affected by their dissemination.

To the extent that the UAW letters might be regarded as "propaganda," such is common in almost all representation elections. The employees were free to evaluate the letters as such, and Contech was free to respond in kind. If absolute objectiveness and pristine conduct were required in order to sustain an election, then virtually none would survive the rough and tumble of labor-management contentiousness. *See Dickinson*, 153 F.3d at 284 ("Although the Board strives to maintain 'laboratory conditions' during representation elections, such conditions are rare, 'and elections are not automatically voided whenever they fall short of perfection.'") (quoting *Duriron*, 978 F.2d at 256). Instead, it is sufficient that the misrepresentations not be "so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where their right to a free and fair choice will be affected." *Van Dorn*, 736 F.2d at 348. Accordingly, we reject Contech's contention that the UAW conducted a campaign of deliberate and pervasive misrepresentations that unlawfully influenced Contech's employees.

*Appendix A*

## III. CONCLUSION

Because substantial evidence supports the Board's decisions to set aside the results of the first election and to certify the results of the second election, we **DENY** Contech's petition for review and **GRANT** the Board's cross-application for enforcement of its order.

## APPENDIX B — DECISION AND DIRECTION OF SECOND ELECTION OF THE NATIONAL LABOR RELATIONS BOARD DATED DECEMBER 19, 1995

Contech Division, SPX Corp. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, Petitioner. Case 7-RC-20485

December 19, 1995

### DECISION AND DIRECTION OF SECOND ELECTION

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held January 12, 1995, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 154 for and 196 against the Petitioner, with 4 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings and recommendations,[1] and finds that the election must be set aside and a new election held.

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1. Member Cohen finds it unnecessary to pass on the hearing officer's recommendations regarding Objections 1 and 3 as he agrees that Objection 5 should be sustained.

*Appendix B*

The Petitioner filed six objections to the election. The hearing officer recommended sustaining (1) that part of Objection 1 alleging Employer predictions of loss of customer business as an inevitable result of a union victory; (2) Objection 3 (alleging Employer threats that it would close the plant and go out of business, or that customers would remove work from the Employer if the Union won the election); and (3) Objection 5 (alleging Employer confiscation of union literature). We agree with the hearing officer, for the reasons fully set forth in his report, that Objection 5 should be sustained. We also agree with him, for the reasons set forth below and in his report, that those parts of Objections 1 and 3 alleging Employer predictions of loss of customer business as an inevitable result of a union victory should be sustained. Accordingly, we direct that the election be set aside and that a second election be conducted.[2]

## I. FACTS

The Employer produces automotive parts for TRW, Ford Motor Company, and other automotive suppliers at the Employer's Dowagiac, Michigan plants 1 and 3 involved in this proceeding.

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2. The hearing officer recommended overruling the remaining objections. We reject the Petitioner's exception and we adopt the hearing officer's recommendation to overrule Objection 6. In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendations to overrule that part of Objection 1 alleging Employer threats and predictions of strikes and violence if the Union won the election, and Objections 2 and 4.

*Appendix B*

On November 17, 1994,[3] 3 days after the Union filed the representation petition in this case, Employer Human Resources Manager Dwayne Weber distributed a letter to employees asserting, among other things, that over two-thirds of the 600 plants that had closed in Michigan over the past 2 decades had union work forces.

One of the Employer's election campaign handouts to employees contained a reprinted newspaper article concerning Ford's removal of their manufacturing dies from a struck supplier's plant in Indiana. In the margins of the reprinted pages, the Employer emphasized two statements from the article, as follows: "DIES OWNED BY FORD MOTOR COMPANY," and "THE DIES WOULD HAVE STAYED AT THE PLANT ANOTHER FOUR YEARS IF THE STRIKE HAD NOT OCCURRED." The Employer also emphasized in the margin that the union involved in the article was the UAW — the Petitioner in this case. Another of the Employer's campaign handouts to employees contained a reprint of a 1982 letter from one of the Employer's customers to the Employer's then-general manager, in which the customer states that it had "*closed its doors . . . due to union difficulties*" (emphasis in handout as distributed by the Employer). On the back page of both of the above handouts, the Employer printed the following message, in large print: "SAY NO TO THE POSSIBILITY OF LOST CUSTOMERS, LOST JOBS, LOST PAY, LOST BENEFITS, AND OTHER TROUBLES — VOTE NO."

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3. All dates are November 1994 through January 1995 unless otherwise stated.

*Appendix B*

Also during the critical period, the Employer showed a series of videos to the employees, in small group meetings. One video dealt with strikes and plant closings at plants where employees were represented by unions, focusing primarily on the UAW.

Around Christmas, the Employer removed production of a Ford part (identified as MN-12) from its Dowagiac, Michigan facility involved in this proceeding, and assigned production of it to its Auburn, Indiana facility, which is not involved in this proceeding. The Employer did not, however, provide the Dowagiac employees with an explanation for why production of this Ford part was being removed from the facility. Director of Manufacturing Joe Barry testified that although he normally would have considered it important for morale purposes to let the Dowagiac employees know why production of a part was leaving the plant, he did not, in this instance, issue any explanatory communication to the employees, and he offered no reason at the hearing for not having done so.

The Employer also manufactures rack and pinion housing castings for TRW at the Dowagiac facility, using TRW's manufacturing dies in the process. Manufacture of this product constitutes about 90 percent of the output of plant 1 and about 15 percent of the output of plant 3. The Employer's 5-year contract with TRW for the manufacture of this product was scheduled to expire on December 31, 1995, about a year after the scheduled election. A few days after the Union filed its representation petition on November 14, the Employer and TRW began negotiations for a successor contract, to continue production of TRW's

castings. During this first negotiating session, TRW's director of purchasing, Gary Mahon, told the Employer's director of sales and marketing, Robert Davis, that TRW wanted to postpone continued contract negotiations until the Employer's union representation issue as well as some longstanding quality and delivery issues between the Employer and TRW were resolved.

In a December captive audience speech, Manufacturing Director Barry brought up the subject of TRW's relationship with the Employer, telling the employees that TRW would not sign a contract for production of the castings until after the election. In a separate captive audience speech, Manufacturing Manager Brad Farver again raised the subject of TRW's attitude toward unionized suppliers, referring to a letter from TRW to the Employer, and indicating to the employees that TRW executives did not want to work in companies that had unions, and telling them that TRW had communicated a concern to the Employer about the possibility of the Employer becoming unionized. Farver, however, declined to elaborate when asked by employees at this meeting to explain his comments about why TRW would not want to deal with the Employer if it became unionized. Nor did the Employer explain to the employees that product quality and delivery issues were contributing factors in TRW's hesitancy at entering into a long-term renewal contract.

During a series of late December meetings with groups of employees called to show an antiunion video depicting strike violence, Barry and Farver each brought up the subject of the Employer's above-contract renewal negotiations with

TRW. Barry told the employees that the negotiations had been suspended "until we got some of our problems behind us." Farver told the employees that TRW had postponed long-term agreements "until our issues are resolved."

During the 2 weeks immediately preceding the election, the Employer displayed large poster photographs of closed manufacturing plants. These posters remained on display in both plants until just before the election. Then, on January 10, 2 days before the election, the Employer distributed a handout signed by Human Resources Manager Weber that explained that all of the plants pictured in the posters were in Michigan and were now closed, that all of the employees who had worked in those plants were now laid off, many permanently, and that in each instance the laid off employees had been represented by a union. Weber's memo went on to state that since 1987, there had been a reduction of almost 400 unionized (UAW) jobs at the Employer's parent company plant in Muskegon, Michigan, and that within the past year, 105 unionized jobs were lost when the Employer's parent company closed the Ravenna, Michigan plant because of "ineffective operation," The memo said that the point was simple: "A UNION DOES NOT PROVIDE JOB SECURITY."

In the meantime, about a week or two before the election, Supervisor Mark Hunsberger told at least three or four employees individually that the Employer was known for correcting its mistakes, and that TRW had sent one of its dies to another company to see if they could produce the part.

*Appendix B*

On January 9, 3 days before the election, the Employer's president, Al Zagotta, sent a letter to all employees in which he informed them that the Employer was in a "very critical stage in its relationship with certain key customers like TRW, Ford, and Saginaw." Zagotta's letter continued:

> I am concerned that if the Dowagiac plant develops a reputation for not being a dependable supplier — because of labor problems, a UAW-led strike, or even the possibility of a strike every time the contract comes up for renewal — our customers may become nervous and look elsewhere for another source for their parts.

There is, however, no objective factual evidence to support Zagotta's implication to employees that the Employer's customers "become nervous" as a result of the mere presence of a union.

In a captive audience speech to employees on January 10, 2 days before the election, Division Manager Gary Walker emphasized that the Employer was "greatly concerned about the impact the union could eventually have on our customers like TRW and our ability to compete." He also referred to what he termed the "horrendous strike record of the UAW," "the 100's [hundreds] of closed plants in Michigan and the hundreds of thousands [of] UAW members who lost their jobs . . . as a result of inefficient operation and UAW-led strikes." Walker told the employees that from what he had personally seen, "the UAW is always at the heart of conflict." Walker told the employees about three plants owned by the Employer's parent company in

Western Michigan (which were also described in Human Resource Manager Weber's January 10 memo to employees, distributed the same day as Walker's captive audience speech), which were unionized and either partially or totally shut down because they were allegedly no longer competitive.

Also on January 9 and 10, during the same 2-day period when Zagotta and Walker made their above statements to the employees, and just a few days before the January 12 election, TRW Quality Representative Jack Fannon made a very thorough inspection tour of the Employer's Dowagiac facility, accompanied by an entourage of Employer managers and supervisors — all of which was highly visible to the employees.

## II. ANALYSIS AND CONCLUSIONS

The Supreme Court has cautioned that while an employer may make a prediction to its employees about the precise effect that it believes that unionization will have on the company:

> [T]he prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond [the employer's] control or to convey a management decision already arrived at to close the plant in case of unionization. . . . If there is any implication that an employer may or may not take action solely on its own initiative for reasons unrelated to

> economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion . . . . [A]n employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal taken solely on his own volition."[4]

Applying these principles to the facts in this case, we agree with the hearing officer that parts of the Employer's speeches, statements, and other communications had a reasonable tendency to create and reinforce an atmosphere of fear among the employees that a union victory could result in loss of work, jobs, and customers, and in-plant closure.

Thus, as the hearing officer found, in the absence of an explanation from the Employer to the employees for the removal of production of Ford's MN-12 part, the reprinted newspaper article distributed to employees about Ford's removal of their manufacturing dies from a struck supplier's plant in Indiana took on added significance for the employees, and would tend to suggest to them that the removal of production of Ford part MN-12 from the Employer's Dowagiac facility may have been related to the presence of the Union.

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4. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618-619 (1969) (citations omitted).

*Appendix B*

As the hearing officer also found, Barry and Farver put the blame for the postponement of the renewal of the TRW contract on the presence of the Union and the election. We also agree with the hearing officer's finding that given the nature of Hunsberger's statement that the Employer's largest customer was trying out alternative suppliers, this statement probably would have been widely disseminated throughout the unit.

Additionally, the hearing officer found, and again we agree, that the comments to employees by Barry and Farver about the postponement of contract renewal negotiations with TRW, and Hunsberger's comments to employees about TRW trying out alternative suppliers, all raised by these Employer officials in the context of the Employer's campaign against the Union, would reasonably lead the employees to conclude that TRW's relationship with the Employer was in jeopardy because of the Union, and that the outcome of the election could determine whether the TRW contract was renewed.

As the hearing officer further found, in the context of the statements of Barry, Farver, and Hunsberger, which gave the employees reason to believe that TRW and Ford were already retreating from their relationship with the Employer because of the Union, Walker's statements in his January 10 speech had a reasonable tendency to make the employees fear that a union victory could result in loss of work for the Employer.

The hearing officer also found that the impression conveyed to the employees by the comments of Barry,

Farver, and Hunsberger was further amplified — intentionally or not — by TRW Representative Fannon's highly visible quality inspection tour just a few days before the election, which in turn (1) gave added weight to Zagotta's stated concern that the Employer's customers would become nervous about the Union's presence, and (2) provided additional context for Walker's expressed concern about whether the Employer's relationship with TRW would be affected by the outcome of the election. Thus, the hearing officer found that the Employer created an atmosphere in which Zagotta's and Walker's end-of-campaign statements to employees would reasonably have been understood by them as an implicit prediction that work and jobs would be lost if the Union won the election. We agree with the hearing officer, and we find that the record does not establish that this prediction is based upon objective facts beyond the Employer's control, and that it thus constitutes an objectionable threat of lost customers, warranting the setting aside of the election.

As seen, the Employer's president, Zagotta, told employees that if the plant developed a reputation for undependability "because of labor problems, a UAW-led strike, or even the possibility of a strike . . . our customers may become nervous and look elsewhere." The Employer argues that Zagotta "did not imply that the presence of the UAW *alone* would *definitively* cause Contech's customers to become nervous," but instead only told them that the customers "*may*" become nervous, and then only "*if*" the plant got a bad reputation because of, inter alia, the "*possibility*" of a strike. Thus, argues the Employer, Zagotta never threatened that adverse consequences would be

deliberately inflicted by the Employer if the Union won the election. But we find that, under the totality of the campaign circumstances set forth above, the employees could reasonably infer from Zagotta's statements that customers, or at least work, would be lost if the Union won the election. The Supreme Court's closing guidance in *NLRB v. Gissel*, supra, is particularly applicable here:

> [An employer] can easily make his views known without engaging in "brinksmanship" when it becomes all too easy to "overstep and tumble [over] the brink". . . . At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees.[5]

The Employer argues further that Zagotta's and Walker's statements are unobjectionable under *NLRB v. Pentre Electric*, 998 F.2d 363 (6th Cir. 1993). We do not agree, because we find that case substantially distinguishable from this one.

In a speech to employees about a month before the election in *Pentre*, the employer's president and owner, Luff, said that specified customers of the employer did not use union contractors. He told the employees that he therefore thought that if they chose to be represented by a union, three of the employer's current customers would stop doing business with the employer. He also told them that he thought the company would not have the same customer

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5. Id. at 620 (citation omitted).

base if the employees chose to be represented by a union, and that he did not know how the company would go about getting another customer base to replace it. Luff also told the employees that they would not have the jobs they had now if they had been represented by a union, and that he thought that it would be very difficult for them to get work if they chose to be represented by a union.

Luff also told the employees, however, that he thought the company could "make it," that it had been successful for 6 years and he wanted to keep it that way, and that he thought it would prosper.

During the week before the election in *Pentre*, the employer's vice-president and co-owner, Meehan, met with about 10 employees in separate one-on-one conversations. He told each of them that in the employer's industry, electrical contracting, the work that the employer was doing was traditionally done by open shop companies, and that the employer was not doing union work and was not competing against union contractors. Meehan also told them that almost all of the employer's large customers were strictly open shop companies, that it would be difficult for the employer to keep these particular customers if it became a union contractor, that if the employer became a union contractor it would have to establish new customers, and that he was not prepared to reestablish the company with a new customer base.

The court found, contrary to the Board, that the executives' statements were protected under Section 8(c) of the Act, and thus not in violation of Section 8(a)(1). The

court noted early in its analysis that "it is often difficult in practice to distinguish between lawful advocacy and threats of retaliation."[6] The court found, however, that the executives' statements in question were nothing more than predictions about the consequences of the employer's unionization, and that there was nothing in the record to show that these predicted consequences were driven by the employer's desire to punish its employees for voting in favor of the union.[7] More specifically, while the court recognized that Section 8(c) does not protect employer predictions about the effects of unionization if they have a reasonable tendency to have a coercive effect on the employees, it found that the reasonable tendency of the statements of the employer's executives was not coercive in effect.[8] In this regard, the court noted that Luff simply and accurately told the employees that most of the employer's customers did not employ union contractors, that he consequently predicted that the employer would therefore lose customers and would have to build a new customer base if the union won the election — and that he did not intimate that the employer would close the plant as a result of union animus. In short, the court found that Luff conveyed nothing more than his analysis of the likely economic consequences of unionization of the employer, in light of his knowledge of the employer's customers and competitors, and on the basis of matters outside of his control. The court also noted that

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6. 998 F.2d at 369 (citation omitted).

7. Id.

8. Id.

*Appendix B*

Luff made no threats and did not intersperse his comments with comments against the union. In fact, as the court particularly noted, Luff even told the employees that the company *would prosper*, and that he and Meehan wanted to continue the company on its successful course.

There were simply no such words of encouragement from the Employer or its executives in the case at hand, and the Employer's words of discouragement and predictions of adverse consequences of unionization were, unlike in *Pentre*, continuous, pervasive, and clearly far more extensive than the remarks of Luff and Meehan in *Pentre*.

More particularly, and unlike in *Pentre*, the Employer here created and reinforced an overall atmosphere of fear among the employees that a union victory could result not only in loss of work and customers, but in plant closure itself. In the midst of all this, and particularly around the same time that the Employer was warning the employees that TRW would not renew its long-term production contract until after the election, the Employer, at Christmas-time, inexplicably removed production of a *Ford* part from its Dowagiac facility. The employer in *Pentre* engaged in no such comparable conduct in the context of its warnings about the possible loss of customers resulting from unionization. Indeed, the Employer here followed its failure to explain the removal of production of the Ford part around Christmas with a display of large poster photographs of closed manufacturing plants, which it left on display until just before the election, at which time it then (1) explained to the employees that these had all been unionized plants, and (2) told several employees that TRW had already

actually shifted some of its production away from the Employer. There was no comparable employer conduct in *Pentre*.

Thus, unlike in *Pentre*, it was not until the Employer had set the stage with the above conduct, statements, and messages that, only 3 days before the election, President Zagotta told the employees that the Employer was at a "very critical stage in its relationship with certain key customers like TRW, Ford, and Saginaw," and that the Employer's customers "may become nervous and look elsewhere for another source for their parts" if the Dowagiac plant developed a reputation for undependability because of, among other things, "labor problems . . . or even the possibility of a strike." The full-blown inspection visit from TRW to Dowagiac in the last remaining days before the election gave the employees actual notice of the asserted "nervousness" of one of the Employer's biggest customers.

Clearly, then, the circumstances addressed by the court in *Pentre* are substantially different in scope and intensity from those created by the Employer here. Unlike in *Pentre*, in the final analysis, there is no evidence here that the Employer's customers would cease being customers simply because the Employer was unionized. The Employer's asserted belief that its best customers would desert it in the face of unionization is not, in our view, supported by the record, and, unlike the court's assessment of the remarks in *Pentre*, does not convey the Employer's belief as to demonstrably probable consequences beyond its control.

*Appendix B*

## DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB

1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington. D.C. December 19, 1995

Margaret A. Browning, Member

Charles I. Cohen, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Appendix B*

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 7-RC-20485

CONTECH DIVISION, SPX CORPORATION

Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Petitioner

DECISION AND CERTIFICATION
OF REPRESENTATIVE

The National Labor Relations Board, by a three-member panel, has considered objections to an election held on March 13, 1996, and the Regional Director's report recommending disposition of them. The election was conducted pursuant to a Decision and Direction of Second Election. The tally of ballots shows 184 for and 150 against the Petitioner with 16 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the Regional Director's report in light of the exceptions and brief, has adopted the Regional

*Appendix B*

Director's findings[1] and recommendations, and finds that a certification of representative should be issued.

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1. In finding that the campaign documents circulated by the Union were at most misrepresentation and therefore did not constitute objectionable conduct, the Regional Director relied on *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) and *Riveredge Hospital*, 264 NLRB 1094 (1982). The Employer contends that the Regional Director employed the wrong legal standard, that the correct legal standard is the one employed by the Sixth Circuit Court of Appeals. The Sixth Circuit has stated that there may be cases where the misrepresentation is so pervasive and the deception so artful that the employees will be unable to separate truth from untruth. *Van Dorn Plastics Machinery, Inc.*, 736 F.2d 343, 348 (6th Cir. 1984) cert. den. 469 U.S. 1208, 105 S.Ct. 1173 (1985). Thus, in *Hub Plastics, Inc.*, 52 F.3d 608 (1995), the Sixth Circuit remanded to the Board for reconsideration a case where the union falsely told employees that the NLRB had made a final determination that the employer was guilty of unfair labor practices. The union pointed to the formal charge it had filed with the NLRB in support of its claim. The Court found that the substance of the misrepresentation may not have been enough to void the election, but that the deception may have been artful enough to affect the employees' free choice.

Unlike *Hub Plastics*, there is no such misrepresentation or deception at issue here. The Union circulated a letter in which it set forth its version of the Board's reasons for ordering a second election. In our view, this is not a case of pervasive misrepresentation or artful deception. At most, the Union has mischaracterized the precise rationale for the Board's decision to set aside the election.

*Appendix B*

## CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been case for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C., August 5, 1996.

Margaret Browning, Member

Charles I. Cohen, Member

Sarah M. Fox, Member

(SEAL) National Labor Relations Board

*Appendix B*

**UNITED STATE OF AMERICA**
**BEFORE THE NATIONAL LABOR**
**RELATIONS BOARD**
**SEVENTH REGION**

Case No.: GR-7-RC-20485

CONTECH DIVISION, SPX CORPORATION

Employer,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Petitioner,

**EMPLOYER'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS**

The employer, Contech Division, SPX Corporation ("Contech") in accordance with the National Labor Relations Board Rules and Regulations Section 102.46, by its attorneys, Miller, Johnson, Snell & Cummiskey, P.L.C., excepts to the following findings and rulings of Hearing Officer, Thomas M. Good, issued on April 17, 1995:

1. Contech excepts to the Hearing Officer's finding and recommendation that "Objections No. 1 and 3 have merit

and I recommend they be sustained." (Hearing Officer's Report and Recommendations on Objections (the "Report") p. 15). (A copy of the Report is attached).

2. Contech excepts to the Hearing Officer's finding and recommendation that "The Employer created an atmosphere where Zagotta's and Walker's end of campaign statements would have been understood as an implicit prediction that work and jobs would be lost in the event the UAW won the election." (Report, p. 12).

3. Contech excepts to the Hearing Officer's finding and recommendation that "Statements made by Zagotta and Walker were not based upon objective facts beyond the employer's control." (Report, p. 12).

4. Contech excepts to the Hearing Officer's findings and recommendation that Zagotta's and Walker's statements constituted an objectionable threat. (Report, p. 12).

5. Contech excepts to the Hearing Officer's finding and recommendation that "Gary Walker's 25th hour speech by itself and in this context implicitly threatened employees with plant closure and had a tendency to interfere with the Employee's free choice in the election." (Report, p. 14).

6. Contech excepts to the Hearing Officer's finding and recommendation that statements made by Walker in his 25th hour speech were not based upon objective facts and were not based upon events beyond Contech's control. (Report, p. 14).

*Appendix B*

7. Contech excepts to the Hearing Officer's following factual findings:

a. That "Barry acknowledged that he did not issue any explanatory communication to employees on this." (Report, p. 8).

b. That the article "It Can't Happen Here" tended to suggest to the employees the loss of the MN-12 job "may have been related to the presence of the UAW." (Report, p. 8).

c. That Farver "told employees that TRW had communicated a concern by a letter about the possibility of a union there." (Report, p. 9).

d. That "Farver did not directly dispute the statements attributed to him by Murray." (Report, p. 10).

e. That "Barry and Farver put the onus for the postponement of the LTA on the presence of the union election." (Report, p. 10).

f. That Supervisor Hunsberger made comments similar to that which he allegedly made to Tommy Lee Walker to other employees. (Report, p. 10).

g. That the comment that Supervisor Hunsberger allegedly made to Walker "would have been widely disseminated throughout the unit." (Report, p. 10).

h. That employees could reasonably concluded that "the election could determine whether the LTA was renewed." (Report, p. 10).

i. That Zagotta implied that Customers become nervous simply because of the presence of a union. (Report, p. 11).

j. That Jack Fannen's tour of the plant "was timed in such a way that its exposure to employees was maximized." (Report, p. 11).

k. That the underlining in the letter from Scott Die Casting to Dale Engle was "added for emphasis in the distribution." (Report, p. 12).

l. That Walker's "statement 'about the problems often associated with the union' was a clear reference to the plant closings he had just described and would have a similar impact on employees as the loser reference in the General Dynamics poster." (Report, p. 14).

m. That "Walker implicitly identified problems often associated with the union as the cause for the loss of profitability, competitiveness and the resulting loss of jobs." (Report, p. 14).

n. That "Walker's 25th hour speech left the impression that unionization and the exercise of the right to strike was a factor in the decisions to close plants." (Report, p. 14).

*Appendix B*

8. Contech excepts to the Hearing Officer's finding and recommendation that "Objection No. 5 be sustained." (Report, p. 19).

9. Contech excepts to the Hearing Officer's finding and recommendation that Contech's "conduct was neither isolated nor de minimis." (Report, p. 19).

10. Contech excepts to the Hearing Officer's finding and recommendation that the supervisor's required that individual employees put their names on union literature they wanted to distribute. (Report, p. 18).

11. Contech excepts to the Hearing Officer's finding and recommendation "that it is immaterial that the union literature was not attended or guarded by employees when confiscated and disposed of by these supervisors." (Report, p. 18).

12. Contech further excepts to the Hearing Officer's failure to contain all relevant facts set forth in this record in his report. Those facts are set forth in the accompanying brief in support of these exceptions.

13. Contech excepts to the hearing officer's finding and recommendation "that the Board direct a second election." (Report, p. 19).

WHEREFORE, Contech respectfully requests that this Board not follow the findings and recommendations of the Hearing Officer as set forth above and that this Board certify the results of the election.

*Appendix B*

Respectfully submitted,

Dated: May 6, 1995

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.
Attorneys for Employer

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*Appendix B*

**UNITED STATE OF AMERICA**
**BEFORE THE NATIONAL LABOR**
**RELATIONS BOARD**
**SEVENTH REGION**

Case No.: GR-7-RC-20485

CONTECH DIVISION, SPX CORPORATION

Employer,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Petitioner,

**EMPLOYER'S OBJECTIONS TO CONDUCT AFFECTING THE RESULT OF THE ELECTION**

The Employer, Contech Division, SPX Corporation, by its attorneys, Miller, Johnson, Snell & Cummiskey, P.L.C. objects to the following conduct by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO (the "UAW") which affected the result of the election held on March 13, 1996:

1. The UAW, its employees, agents and others acting on its behalf, falsely informed employees that the Company had made misrepresentations to them to the effect that one

of its customers would "pull its business". These falsehoods were spread a day before the election, thereby affording the employer absolutely no opportunity to respond.

2. The UAW, its employees, agents and others acting on its behalf, implied to employees that unless the UAW were chosen as the bargaining representative, a significant customer would remove its business from the plant.

3. The UAW, its employees, agents and others acting on its behalf, misrepresented to employees the nature of the findings in the previous objection proceeding which had been held in the above-captioned case. The Employer did not have adequate opportunity to respond.

4. The UAW, its employees, agents and others acting on its behalf, informed employees that front line supervisors favored the UAW, and thereby implied that retaliatory action would be taken against them if they did not vote in favor of the union.

Dated: March 20, 1996

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.
Attorneys for Employer

By s/ David M. Buday
David M. Buday (P43087)
Business Address:
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*Appendix B*

MILLER, JOHNSON, SNELL & CUMMISKEY, P.L.C.
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* * *

March 27, 1996

***VIA HAND DELIVERY***
Mr. Chet Byerly
National Labor Relations Board
Region 7 – Resident Office
82 Ionia, N.W.
Room 330
Grand Rapids, MI 49503-3022

Re: SPX-Contech

Dear Mr. Byerly:

In accordance with your written request for additional information to support the objections the employer filed on March 20, 1996, we are providing you this letter and the attached exhibits. Set forth below is an explanation of how the attached exhibits and the law that governs elections support Contech's position that the UAW engaged in objectionable conduct that requires that the election held on March 13, 1996 be set aside. This information is being provided to you solely for the purposes of investigating the objections that Contech filed.

*Appendix B*

## I. *THE EVIDENCE AND LAW THAT SUPPORT OBJECTIONS NOs. 1 AND 3*

The Sixth Circuit Court of Appeals has repeatedly found that an election must be set aside where a union misrepresentation "is so pervasive and the deception so artful that employees will be unable to separate truth from untruth and where [employees] right to a free and fair choice will be affected". *VanDorn Plastic Machinery Co.* v. *NLRB*, 736 F.2d 343, 348 (6th Cir. 1984): *See also, Dayton Hudson Department Store* v. *NLRB*, 987 F.2d 359, 366 (6th Cir. 1993). This is precisely the type of deliberate miscommunications and deceptions in which the UAW engaged.

First, the UAW distributed a letter dated February 16, 1996 that contains pervasive and deceptive misinformation that impacted the employee's right to a free and fair election. A copy of that letter is attached as Exhibit 1. The misrepresentations all involve the UAW's deliberate misstatements of why the second election was ordered. In particular, the UAW made the following misrepresentations:

- A second election was ordered because "management blatantly mislead you about customer concerns and loss of jobs."

- During the entire first campaign, the company "set out . . . to deliberately misconstrue events and customer actions."

- "[T]hey fully intended and planned to threaten, intimidate and coerce employees."

- "Top management officials were involved in these unsavory illegal objectionable actions against you."

We have enclosed a copy of the Board's decision as Exhibit 2 that resulted in the second election being ordered. A review of that decision establishes that the above statements are entirely untrue.

The purpose of the misstatements was to deceive the employees and to undermine the credibility of management. The UAW describes Contech management as having intentionally plotted a strategy that it knew was illegal and with the express and intended purpose of threatening, intimidating and coercing the employees to vote against the UAW. Those blatant misrepresentations, if made in different context may not be objectionable. However, the truth is, and the employees knew that the Board found that Contech engaged in objectionable conduct during the first election and that the Board ordered the second election. By mixing its misrepresentations with those two facts, the UAW was able to artfully deceive the employees in such a way that it was not possible for employees to separate the truth from untruth.

The UAW's goal in its act of deception is apparent. Credibility is a significant issue in any campaign. If the employees do not believe or trust their employer, employees are unlikely to vote for their employer. Understanding that the UAW intentionally and unlawfully undermined the credibility of Contech management by deliberately misrepresenting that "top management officials were involved in unsavory illegal objectionable actions"

and that management "fully intended and planned to threaten, intimidate and coerce employees".

The UAW's deception was pervasive in that the UAW continued to use this theme throughout the campaign. The UAW continually notified employees that Contech had deliberately threatened and misled them in the first election and that Contech continued to do so during the second election but only in a more deceptive and underhanded manner. Under the standards set forth by the Sixth Circuit Court of Appeals, that conduct by itself is a basis for setting aside the election.

However, there is additional evidence that the UAW continued its deliberate campaign of misrepresentations throughout the entire course of the campaign: A letter the UAW distributed to the employees from Ford Motor Company dated March 12, 1996. A copy of which is attached as Exhibit 3.

As that letter reflects, it was solicited by the UAW. The letter specifically states that it is written "pursuant to the [UAW's] inquiry."

The inquiry itself is also reflected in the body of the letter. Specifically, the UAW intentionally misrepresented to Ford Motor Company that Contech had represented to its employees that, if the UAW won the election, customers such as Ford *would* pull work from Contech. In truth, Contech made no such representations. Nonetheless, as the letter states, the UAW misinformed Ford that Contech's "plant manager in the past has advised employees that if

the current UAW organizing effort is successful, Ford will 'pull' its business."

The UAW distributed that letter to employees on the day before and/or on the day of the election. Any employee reading the letter could reasonably conclude that Contech had represented to employees that if the UAW should win the election, Ford and other suppliers *would* pull their work from Contech. Moreover, as the letter assertively states, Ford would not pull its work if the UAW won the election. Thus, the letter inaccurately portrays Contech as lieing to its employees.

When that misrepresentation is coupled with the misrepresentations of why the second election was ordered as set forth above, employees could reasonably be deceived into concluding that "top management officials [were again] involved in unsavory, illegal, objectionable actions"; that once again Contech was "deliberately misconstru[ing] events and customer actions"; and Contech had again "intended and planned to threaten, intimidate and coerce employees."

Those two communications distributed by the UAW establish that the theme of its campaign was to misrepresent the actions of Contech in such a way as to undermine its credibility. Attached as Exhibit 4 is another piece of UAW literature that supports that. The UAW did this in a deceptive, pervasive and artful manner, and as a result, the UAW was able to impact employees' fair and free choice. Under such circumstances, the law requires that the election be set aside.

*Appendix B*

## II. *THE EVIDENCE AND LAW THAT SUPPORT OBJECTION NO. 2*

The March 12, 1996 letter from Ford Motor Company is also objectionable because it unlawfully misrepresents to employees that if the UAW is not voted in at Dowagiac, Ford will pull its work. Specifically the letter provides in part:

> Removal of product, simply because employees of a supplier elect to join the UAW is definitely not Ford Motor Company's policy. Representations to the contrary would be without foundation.
>
> SPX-Contech is, and has been, a supplier to Ford for housings used in the manufacture of rack and pinion steering gears and climate control devices. To ensure no misunderstanding exists, FAO purchasing will contact management of SPX-Contech and clearly reiterate Ford's position as reflected above.

The nature and tone of the portion of the letter quoted above is to indicate that Ford is dissatisfied and angry with Contech. It is angry with Contech because of the misrepresentations made by the UAW that the plant manger had advised employees that if the UAW won the election, Ford would pull its business. The reasonable conclusion to be reached from a reading of that letter is that if the UAW did not win, Ford would pull its work from Contech.

Again, it is important to note that this letter is dated March 12 — that is one day before the date of the election. It was distributed on March 12 and/or on the day of the election. It was impossible for Contech to respond to this letter. The impact of this letter was significant. It likely unlawfully persuaded and/or coerced employees to vote in favor of the UAW. Consequently, the election should be set aside.

## III. *THE EVIDENCE AND LAW THAT SUPPORT OBJECTION 4.*

In support of objection 4, Contech offers a document, a copy of which is attached as Exhibit 5. This document purports to have been prepared by the "In Plant Organizing Committee". This document was posted by organizing committee members on an employee bulletin board. We believe that if a hearing were convened to which the employer would be allowed to subpoena witnesses it would be established that members of the organizing committee did indeed prepare this document. Through testimony of subpoenaed witnesses, it would also be established that the members of the organizing committee are essentially agents of the union because of the direction and training they received from the union, and that the union did participate in the creation and publication of this document.

The portion of the document that is objectionable is found on the first page where it states:

> If you think about it, management can't see why we need a union. Have you noticed that the

> supervisors are not trying to talk us out of voting yes this time? They are the ones that used to be in the position we are in. They can relate to our fears of having little or nothing after many years of dedicated service.

The implication is, of course, that the front line supervisors support the union and the members of the organizing committee have some inside information about this. The Board takes a very dim view of cases in which supervisors support the union. In *Sil-Base Company*, 290 NLRB 1179 (1988), the Board had this to say:

> There are three situations in which a supervisor's pro-union conduct may warrant setting aside an election. The first is when the employer takes no stand contrary to the supervisor's pro-union conduct and employees may be led to believe the employer favors the union. The second involves the possibility that the supervisor's pro-union conduct could coerce employees into supporting the union out of fear of future retaliation by that supervisor. The third is similar to the second situation except that instead of coercion by fear of retaliation, the employees could be coerced out of a hope of reward by the supervisor.

*Id.*

The testimony of company officials will establish that during the campaign period, supervisors were directed to

maintain a low profile on the union issue. The union seized upon this fact to represent to employees that the front-line supervisors supported the union. This representation is inherently coercive because it suggests to employees that unless they follow the wishes of their supervisors by supporting and voting for the union there would be retaliation. Under these circumstances, the laboratory conditions required for a proper election did not exist.

In the event that you require further information or have any questions about anything contained within this letter, please contact me.

Sincerely,

MILLER, JOHNSON, SNELL
& CUMMISKEY, P.L.C.

By s/ David M. Buday
David M. Buday

DMB/jad
Enclosure
cc: Kord Kozma

## APPENDIX C — REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION OF THE NATIONAL LABOR RELATIONS BOARD FOR THE SEVENTH REGION ON OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION DATED APRIL 2, 1996

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**SEVENTH REGION**

CASE NO. GR-7-RC-20485

CONTECH DIVISION, SPX CORPORATION

Employer

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO

Petitioner

### REGIONAL DIRECTOR'S REPORT AND RECOMMENDATION ON OBJECTIONS TO CONDUCT AFFECTING THE RESULTS OF THE ELECTION

Upon a Decision and Direction of Second Election dated December 19, 1995, and mailed by the Board on February 1, 1996, (delay due to the government shutdown) a second

election was held in the above-captioned matter on March 13, 1996, among the employees of the Employer in the following appropriate collective bargaining unit:[1]

> All production and maintenance employees employed by the Employer at its facilities located at 51241 M-51 North, Dowagiac, Michigan; BUT EXCLUDING all other employees, including all office clerical employees, guards and supervisors as defined in the Act.

The payroll period for eligibility purposes was the weekly period ending, Sunday, February 11, 1996.

Upon the conclusion of the election, a copy of the Tally of Ballots, indicating the following results, was made available to each of the parties in accordance with the current Rules and Regulations of the Board:

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1. The petition was filed on November 14, 1994. Pursuant to a Stipulated Election Agreement executed by the parties and approved by the undersigned on December 7, 1994, an election was held on January 12, 1995, which the Petitioner lost. On January 19, 1995, the Petitioner filed Objections To Conduct Affecting the Results of the Election. The objections raised substantial and material factual issues, including credibility issues. A hearing was held on March 9 and 10, 1995. On April 17, 1995, the hearing officer issued his report and recommendation on objections, finding that certain of the Employer's conduct was objectionable and recommending that the first election be set aside and a second election held.

*Appendix C*

Approximate number of eligible voters ..... 345
Void ballots ..... 4
Votes cast for Petitioner ..... 184
Votes cast against participating labor organization ..... 150
Valid votes counted ..... 334
Challenged ballots ..... 16
Valid votes counted plus challenged ballots ..... 350

The challenged ballots were not determinative of the ultimate results of the election.

## THE OBJECTIONS

On March 20, 1996, the Employer timely filed Objections To Conduct Affecting the Results of the Election, a copy of which was served by the Grand Rapids Resident Office upon the Petitioner on the same date. The Employer's objections are attached hereto and marked as Exhibit 1.

An investigation was conducted under the supervision of the undersigned and all parties were afforded an opportunity to present evidence bearing on the objections. Based thereon, I make the following findings, conclusions and recommendations.

***OBJECTIONS NOS. 1-3:***

The Employer claims that the Petitioner, through several campaign documents, misrepresented why the second election was being held; falsely informed the

employees that the Employer had misrepresented to the employees that one of its customers would "pull its business"; and implied that unless the Petitioner was selected as their bargaining representative, a significant customer would remove its business from the plant.

The Employer claims that in the Petitioner's letter of February 16, 1996, to employees, which is attached hereto and marked as Exhibit 2, the Petitioner misrepresented why the second election was being held. More particularly, the Employer claims the following as misrepresentations:

(a) A second election was ordered because, "management blatantly mislead you about customer concerns and loss of jobs."

(b) During the entire first campaign, the company, "set out . . . to deliberately misconstrue events and customer actions."

(c) "They fully intended and planned to threaten, intimidate and coerce employees."

(d) "Top management officials were involved in these unsavory illegal objectionable actions against you."

The Employer claims that the Petitioner continued to raise the issue of the Employer's conduct prior to the first election and why a second election was held through a letter dated March 11, 1996, from UAW Local 1218, President, Les Hodge, and that this letter was a further

misrepresentation as to why the second election was ordered and the issue of customers "pulling their work" from the plant. A copy of that letter is attached hereto and marked as Exhibit 3.

Additionally, the Employer claims that the Petitioner continued with its objectionable conduct through a March 12, 1996, letter from Ford Motor Company representative Phil Dubensky to Gerald Banton of the International Union, UAW Ford Department. A copy of that letter is attached hereto and marked as Exhibit 4. The Employer claims that this letter, which was solicited by the Petitioner, intentionally misrepresents to Ford Motor Company, a major customer of the Employer, that the Employer had represented to its employees that, if the Petitioner won the election, customers such as Ford would pull work out of the plant. The Employer further claims that the letter misrepresented to Ford Motor Company that the Employer's ". . . Plant Manager in the past has advised employees that if the current UAW [Petitioner] organizing effort is successful, Ford would 'pull' its business."

The undersigned concludes that under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982), the complained of letters do not constitute objectionable conduct. The Board will no longer consider the truth or falsity of campaign statements made verbally or in documentary form. Furthermore, in *Riveredge Hospital*, 264 NLRB 1094 (1982), the Board stated that it will treat alleged misrepresentations of Board actions the same as all other misrepresentations and will refuse to consider the truth or falsity of such statements. Accordingly, assuming but not

finding that the documents noted herein constitute misrepresentations, the undersigned finds that no objectionable conduct was engaged in by the Petitioner. Accordingly, it is recommended that Objections Nos. 1-3, be overruled.

***Objection No. 4:***

In this objection, the Employer claims that an undated letter from the Petitioner's in-house organizing committee, apparently posted on or about March 8, 1996, on a bulletin board at the plant, shows that front line supervisors favored the Petitioner and thereby implied that retaliatory action would be taken against the employees if they did not vote for the Petitioner. A copy of that letter is attached hereto and marked as Exhibit 5. The Employer claims that the following are objectionable statements: "If you think about it, management can't see why we need a Union. Have you noticed that the supervisors are Not trying to Talk us out of voting Yes this time? They are the ones that used to be in the position we are in. They can relate to our fears of having little or nothing after many years of dedicated service."

In *Sil-Base Co.*, 290 NLRB 1179 (1988), the Board stated that in cases of supervisory involvement, it would look to the ability of the supervisor to both reward and retaliate against employees and the extent of the supervisor's prounion conduct. Here the Employer has not indicated that any specific supervisor was involved in any prounion conduct. It merely points to the quoted sentences in the two-page letter and does not describe any specific prounion conduct by its supervisors. The Petitioner indicates that

there were no supervisors on its in-house organizing committee and no supervisors were involved in its organizing campaign. Furthermore, the Employer admits that it informed its front line supervisors that they were to keep a low profile during this second election campaign. Additionally, the Employer concedes that it conducted an anti-union campaign prior to the second election wherein it made it clear that it opposed the Petitioner's efforts to organize the employees. This campaign took the form of employee meetings and various literature.

Based on the evidence, the undersigned concludes that the Employer has failed to establish that, in fact, its supervisors engaged in prounion conduct. Moreover, if they did so engage, the employees would not reasonably be misled into believing that the Employer favored unionization. Accordingly, it is recommended that Objection No. 4 be overruled.

## RECOMMENDATION

It is recommended that the Employer's objections be overruled in their entirety and that a Certification of Representative issue.[2]

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2. Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D. C. Pursuant to Section 102.69(f), affidavits and other documents which a party has submitted timely to the Regional Director in support of objections are not a part of the record unless included in the Regional Director's Report or appended to the exceptions or opposition thereto which a party submits to the Board. Exceptions must be received by the Board in Washington, D. C. By April 16, 1996.

*Appendix C*

Dated at Detroit, Michigan, this 2nd day of April, 1996.

(SEAL)

/s/William C. Schaub, Jr.
William C. Schaub, Jr.,
Regional Director
National Labor Relations Board
Seventh Region
Patrick V. McNamara
Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226

Attachment

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 11, 1999

97-5099/5247

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONTECH DIVISION, SPX CORPORATION,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner,

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW,

Intervenor.

ORDER

**BEFORE:** RYAN, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges

of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

s/ Leonard Green
**Leonard Green, Clerk**

## APPENDIX E — HEARING OFFICER'S REPORT AND RECOMMENDATIONS OF THE NATIONAL LABOR RELATIONS BOARD FOR THE SEVENTH REGION ON OBJECTIONS DATED APRIL 17, 1995

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR**
**RELATIONS BOARD**
**SEVENTH REGION**

Case No. GR-7-RC-20485

**CONTECH DIVISION, SPX CORPORATION**

Employer

and

**INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO**

Petitioner

### HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON OBJECTIONS

Upon a petition filed on November 14, 1994, and pursuant to a Stipulated Election Agreement executed by the parties and approved by the Regional Director for Region Seven on December 7, 1994, an election by secret ballot was conducted on Thursday, January 12, 1995, among the employees of the Employer in the following appropriate unit:

*Appendix E*

All production and maintenance employees employed by the Employer at its facilities located at 51241 M-51 North, Dowagiac, Michigan; BUT EXCLUDING all other employees, including all office clerical employees, guards and supervisors as defined in the Act.

The payroll period for eligibility purposes was the bi-weekly period ending Sunday, November 27, 1994.

Upon conclusion of the count of ballots, a copy of the Tally of Ballots, indicating the following results, was made available to each of the parties in accordance with the current Rules and Regulations of the Board:

| | |
|---|---|
| Approximate number of eligible voters | 366 |
| Void ballots | 2 |
| Votes cast for Petitioner | 154 |
| Votes cast against participating labor organization | 196 |
| Valid votes counted | 350 |
| Challenged ballots | 4 |
| Valid votes counted plus challenged ballots | 354 |

The challenged ballots were insufficient in number to affect the results of the election. A majority of valid votes cast plus challenged ballots was not cast for the Petitioner.[1]

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1. A switch of 24 votes, or 6.8% of the votes counted plus challenged ballots, would have resulted in a majority for the Petitioner.

*Appendix E*

On January 19, 1995, the Petitioner timely filed Objections to Conduct Affecting the Results of the Election, a copy of which was served on the Employer by the Board's Grand Rapids Resident Office on January 20, 1995. Following a preliminary investigation, a Report and Notice of Hearing on Objections was issued on February 9, 1995, by the Regional Director. Therein he concluded that the Petitioner's six (6) enumerated Objections raised substantial and material issues of fact including credibility issues, and that these issues could best be resolved by a hearing. The Objections are here set forth *verbatim*:

"During the course of the Union's organizing drive, the employer and his agents . . .

1. Conducted a campaign of fear and intimidation through predictions of violence, strikes, loss of customers and economic detriment which they insinuated would inevitably result from a union victory.

2. Made pro-company campaign insignia available to employees, thereby forcing the employees to make known their pre-election preferences.

3. Threatened to go out of business, close the plant or that customers would remove work if the union won the election.

4. Created the impression of futility by stating that the employer would not bargain in good faith if the union won the election.

5. Confiscated union literature.

6. In addition, the election was conducted in an area used by the employer to propagandize employees."

On March 9 and 10, 1995, at Cassopolis, Michigan, a hearing in this matter was held before the undersigned Hearing Officer, conducted according to the Board's Rules and Regulations, Series 8, as amended. The Petitioner and Employer were each afforded full opportunity to be heard, to introduce evidence, to call, examine and cross-examine witnesses, and to argue orally. The findings of fact and credibility resolutions which follow are based upon my consideration of the entire record[2] and upon my observation of the testimony and demeanor of the witnesses.

## BACKGROUND

The Employer operates two adjacent plants, designated as plants #1 and #3, in Dowagiac, Michigan, where it produces automotive rack and pinion housings and other automotive parts for TRW, Ford Motor Company, and other automotive suppliers. The precise number of employees working at each plant is not clear from the record, but it is clear that plant #3 is the larger of the two. Contech has two other plants in Indiana. The Employer's parent Corporation, SPX (Sealed Power) operates other plants in Muskegon, Michigan.

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2. Accordingly, any failure to completely detail all conflicts in evidence does not mean conflicting evidence was not considered. *Bishop and Malco, Inc. d/b/a Walker's*, 159 NLRB 1159 (1966).

*Appendix E*

***Objection No. 1 and 3***

These two objections will be considered together, because the alleged threats to go out of business, close the plant, or that customers would remove work if the union won (Objection #3) are related to and comprehended by the broader language of Objection #1: "Conducted a campaign of fear and intimidation through predictions of violence, strikes, loss of customers and economic detriment which they insinuated would inevitably result from a Union victory." At issue is whether elements of the Employer's campaign individually, in combination with each other, or the campaign *in toto*, predicted or threatened consequences of unionization in a way that interfered with the election. First, however, I will deal with three instances of alleged interference by supervisors or representatives of management in one-on-one conversations with employees.

**Alleged Spoken Threats by Supervisors**

The first of these is only arguably but not clearly encompassed by a very broad reading of Objection No. 1, in that it involves a threat of unspecified reprisal to an individual employee during the campaign. Nonetheless, it was litigated without objection from the Employer. Plant #1 production technician Loisa Murray testified that in December, 1994, Die Cast Manger Patrick Harding tried to show her some Employer campaign literature describing employee complaints and unfair labor practice charges against the UAW. He indicated that he thought something in there was funny. Murray refused to look. She then said their conversation "went back and forth a couple of times,"

and then Harding became angry and said, "I'll remember that." Murray could not recall what had been said immediately before Harding's statement that he would "remember that." She said that Harding later paid an unusual visit to her work area, looking over her machine and parts.

Supervisor Harding recalled the encounter differently. While distributing some of the Employer's campaign literature to employees, he found Murray reading some other material and commented. "Oh I see you're reading that." Murray, apparently perceiving an implied insult in this, responded, "Yeah, I'm capable of doing that." Harding rejoined, "That's good," and asked her to keep the literature off the work station if she was going to retain it. Murray said she would. Harding denied becoming angry with her, and denied saying that he would "remember that."

Both Murray's and Harding's description of their conversation struck me, for the most part, as credible, and it seems likely that they were describing different parts of the same conversation. To the extent that Murray's and Harding's testimony conflicts on whether he told her he would, "remember that," I credit Murray. However, due to the lack of immediate context for this statement in Murray's account, it is not possible to identify what it was Harding said he would remember. If the comment followed Murray's assertion that she was capable of reading the campaign literature, it would be a completely innocuous statement. Without immediate context it is not possible to gauge whether the statement would tend to interfere with the election.

*Appendix E*

Employee Shirley Stroud testified that for about six months ending in December, 1994, group leader George Avery was Acting Foreman while regular Foreman Mark Hunsberger served as Acting Director of Manufacturing. Stroud testified that Avery told her that if the Union got in, the company would have to find other suppliers to fall back on, and that the employees would have to go on strike to get a signed contract. Avery was not called as a witness. However, the record does not reveal when this conversation took place, whether it was before or after the petition, or before or after Avery's assignment as Acting Foreman ended in December, 1994. Also, the Petitioner who seeks to have this statement attributed to the Employer has not clearly established Avery's agency or supervisory status. Aside from the "Acting Foreman" designation, and witness Danny Truelove's statement that Avery spent more time doing paperwork in the office during this period, there is no evidence in the record that Avery possessed or exercised statutory supervisory authority during this period. The burden of establishing an individual's supervisory status rests with the party asserting it, in this case the Petitioner. *Gold Shield Security and Investigations, Inc.*, 306 NLRB 20, 21 (1992). Petitioner has not met this burden. For these reasons I find the record does not support a conclusion that Avery's conduct was objectionable.

Employee Sheila Lott testified, at first, that after the petition was filed she approached plant #3 Manager of Manufacturing Mark Hunsberger and asked his opinion of the Union. She stated that Hunsberger told her that if the union got in, both plants would close. However, later in her testimony she was emphatic that this conversation took

place before the filing of the petition on November 14, 1994. Accordingly, it took place before the critical period. Moreover, Lott indicated that she told no one of this conversation until after the election.

Employee Kevin Whiteoak testified about a conversation initiated by Manufacturing and Engineering Manager Paul Brancaleon, in which Brancaleon questioned him about why he was supporting a union at Contech. During the conversation, Brancaleon allegedly cautioned him to be careful of what he was doing, because 400 jobs hung in the balance. Whiteoak said that Brancaleon added that the company's largest customer, TRW, had pulled work out of union shops before, giving Latrobe Die Casting ("Latrobe") as an example. Whiteoak said that he believed this conversation took place after the petition was filed. He told three to four other employees about it.

Paul Brancaleon testified about the same conversation. He recalled that it took place on the afternoon of October 25, 1994, after he returned to the plant from an annual manager's meeting in Kalamazoo. He stated that when he returned to the shop that night he received his first report of union activity from other management personnel. They told him that there had been a union meeting the preceding weekend and that Whiteoak had been there. Brancaleon acknowledged that he then called Whiteoak into his office and questioned him about the Union meeting. He further acknowledged that he told Whiteoak that Latrobe was a union shop that had been purchased by a company called Pace, which subsequently had lost some of TRW's work to Contech. He added that TRW had some very bad

experiences with TRW in the past. He said that he did not recall saying that 400 jobs were at stake in the union matter.

I credit Whiteoak's account that Brancaleon said that Whiteoak should think about what he was doing, because 400 jobs could hang in the balance, a statement that obviously made an impression on Whiteoak. However, in all other respects, due to his general demeanor, the detail of his testimony and his greater ability to recall detail, I credit Brancaleon's account of this conversation as the more complete and accurate. Because Brancaleon was able to link this conversation in time with the date of the October 25, 1994 manager's meeting, I find that was the date on which the conversation took place. Accordingly, this exchange occurred prior to the November 14, 1994 filing of the petition and outside of the critical period. Therefore, this conversation, standing alone, cannot be the basis for an Objection. *Data Technology Corp.*, 281 NLRB 1005, 1007 (1985). It may be considered only if it provides meaning and dimension to post-petition conduct. *Dresser Industries*, 242 NLRB 74 (1979). *Turner Shoe Company, Inc*, 249 NLRB 144 ftn.2 (1980).

***THE EMPLOYER'S CAMPAIGN***

The Employer's campaign comprised four elements: posters depicting closed plants, printed literature mailed or distributed to employees or posted in the plant, video presentations, and speeches by management officials.

*Appendix E*

**The posters**

During the last two weeks of the campaign the Employer displayed large poster photographs of closed manufacturing plants in both Plant #1 and #3. The posters remained on display until just before the election. An Employer campaign distribution dated January 10, 1995, is signed by Human Resources Manager Dwayne Weber. It explains that the plants pictured in the posters are all in Michigan, that all are closed, that the employees who worked there are all laid off, "many permanently," and that in each case the employees were represented by a union. The memo goes on to state, "Within Sealed Power, there are over 400 fewer union jobs since June of 1987. Most of those were UAW jobs in Muskegon. Within the past year, 105 union jobs were eliminated when Sealed Power closed the Ravenna plant due to that plant's ineffective operation. The point to all this is simple. **A UNION DOES NOT PROVIDE JOB SECURITY.**" (Emphasis in original.)

**Campaign literature**

The Employer distributed, mailed or posted about thirty pieces of literature to the unit employees during the campaign. Although the parties could not stipulate that each piece of literature was distributed "throughout the unit," testimony was received that in addition to supervisors hand-distributing the employer's literature, some were placed in stacks in the lunchroom for employees to pick up. Plant #3 employee Shirley Stroud testified that there were "at least a hundred" pieces of Employer campaign literature posted on the stockroom wall in her plant, which

is a conservative estimate of the number of printed pages submitted as the Employer's campaign material in Joint Exhibit 1. Neither party advanced evidence or argument that any of the Employer's campaign literature should be discounted for lack of full distribution. In the absence of such evidence or argument, and on the basis of the parties' stipulation and the testimony received concerning the Employer's methods of distribution, I find that each of the documents in Joint Exhibit 1 were mailed, distributed, or posted in such a way that at least a majority of bargaining unit employees were exposed to each of them.

I have not considered any of the undated material unless its text clearly indicates it was posted or distributed during the critical period[3]. Joint Exhibits 1-(a), (b) and (s) are all dated outside the critical period, and they have also been excluded from consideration.

**The videos**

In addition to its campaign literature and posters, during the critical period the Employer showed three videos to the employees, each in a series of small group meetings. These have been made part of the record. Joint Exhibit 6(a) is a film titled "*Union Watch*" which deals with strikes and plant

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3. Campaign literature that contains an admonition to "vote no" or a reference to the January 12 election date was clearly distributed or posted after the petition was filed and before the election. Before the petition was filed, the election date and whether there was to be an election at all was not known. The undated campaign distributions containing no such references are: Joint Exhibits. 1-(d), (g), (k), (p), (v), (bb) and (cc).

closings at plants where employees are represented by unions, focusing primarily on the UAW. Joint Exhibit 6(b), the "*Guardian*" video, shows television news reports concerning a 1986 strike and picket line violence at Guardian Industries' plant in Carlton, Michigan. The same video contains a CBS News feature on the UAW's unsuccessful attempt to organize a Nissan plant in Smyrna, Tennessee. This video was shown to employees shortly before the December holiday shutdown, at a series of meetings conducted by Director of Manufacturing Joe Barry. The third video was presented to the bargaining unit employees on Tuesday, January 10, 1995, at the end of the Company's campaign. It is Joint Exhibit 6(c), the "25th hour video," a reference to the prohibition against captive audience presentations to employees during the 24 hours before the opening of the polls, enunciated by the Board in *Peerless Plywood Co.*, 107 NLRB 427 (1953). At the same meeting where the 25th hour video was shown, employees heard speeches by Contech's Division President Gary Walker, and a former general manager of the plant, Dale Engel.

***Alleged predictions of strikes and violence***

The major themes of the Employer's campaign appeared almost immediately after the petition was filed. It's November 17, 1994 distribution is a letter from Human Resources Manager Dwayne Weber asserting that over two-thirds of the 600 plants that closed in Michigan in the last two decades had union workforces, that the UAW has called over 1,000 strikes, averaging 94 days in length and idling 870,000 of its members during a recent 12-year period.

*Appendix E*

Two of the campaign distributions, Joint Exhibits 1(l) and (m) deal exclusively with the UAW-Caterpillar strike in Peoria, Illinois. Both are two-sided three page documents with large, red-ink blotches, perhaps intended to be evocative of blood stains, printed on the front and back pages. The first contains excerpted and highlighted portions of newspaper articles describing the UAW-Caterpillar negotiations and strike in Peoria, Illinois. On its last page it asks, "Are these the kinds of results that you want here at CONTECH?" The second contains excerpts of a complaint filed in Illinois state court alleging threats and physical violence by UAW agents at Caterpillar and portions of unfair labor practice charges filed by employees against the UAW in the same dispute. It states on its last page, "Now its up to you to decide if this is the kind of representation you want here at Contech."

Joint Exhibit 1(q) is a 12-page pamphlet containing newspaper headlines, articles and photographs depicting the 1986 UAW strike at Guardian Industries. There is a removable 1-page insert containing a chronology of the strike. The headlines of the reprinted articles say: "Workers Walk Out at Guardian," "Guardian Advertising for Workers," "Truck Windshield Hit by Gunshot," "Tear Gas Used at Guardian," "Glass Plant Strike Explodes Into Violence." The final page contains a disclaimer in large print: "We are not saying that a strike would necessarily happen here . . . but you deserve to know the facts about the U.A.W."

Another Employer handout is titled "*A Flashback in Time, or Job Security Union Style*" (Joint Exhibit 1(x)).

*Appendix E*

*Flashback* is a 12-page pamphlet containing more newspaper articles about strikes and lockouts, most in the local Southwest Michigan area.

The most voluminous Employer handout of the campaign, Joint Exhibit 1(v), has 27 pages of newspaper articles and photographs describing protracted and faltering strikes, plant closings, permanent replacement of strikers, picket line violence, and shootings. It's cover page proclaims, "The UAW says . . . '*IT CAN'T HAPPEN HERE*!!' " The implication of the title, of course, is that the Employer takes the opposite view, that strikes and violence *can* happen here. On the upper left comer of the back page, in much smaller print, appears the same disclaimer used at the end of the *Guardian* handout.

The *Guardian* video presentation shows local news coverage of a picket line confrontation between local police using tear gas and striking employees, followed by assaults on replacement workers' cars and persons by strikers.

The Employer's campaign associated the UAW and unions in general with strikes and picket line violence, but the literature and videos fall short of suggesting that a strike would be inevitable at Contech. The disclaimers in the printed literature, plus the absence of threats that there would be regressive bargaining lead me to conclude that the Employer did not make such a prediction or threat. *Agri-International Inc.* 271 NLRB 925, 926 (1984).

*Appendix E*

***Alleged threats/predictions that customers would remove work:***

- **Ford's MN-12 part**

Quality Control employee Shirley Stroud testified that shortly before or after the holiday shutdown, a Ford part, rack & pinion #MN-12, which had been produced at plant #3 ceased production and left the plant, with no explanation from management. Director of Manufacturing Joe Barry testified that production of part MN-12 came to Dowagiac about a year ago from the company's Auburn, Indiana plant. It was moved to Dowagiac to make room for some other work in Auburn. Barry said that he had made a commitment to Ford to return production of MN-12 to Auburn before the end of 1994, and that the removal of MN-12 from Dowagiac was done to fulfill that commitment. Under cross-examination, Barry acknowledged that "normally," he would have considered it important for morale purposes to let the Dowagiac employees know why production of a part was leaving their plant. However, consistent with Stroud's testimony that there was no explanation, Barry acknowledged that he did not issue any explanatory communication to employees on this. No reason was offered for Barry's failure to explain the removal of MN-12.

In the Employer's "*It Can't Happen Here!!*" pamphlet there is a reprinted newspaper article titled "DIES REMOVED," concerning Ford's removal of their dies from a struck supplier's plant in South Bend, Indiana. The article's print is very small and difficult to read. But Contech has excerpted some of its text in larger print at the margins

("quote-outs") to emphasize two statements from the article: "DIES OWNED BY FORD MOTOR COMPANY," and ". . . THE DIES WOULD HAVE STAYED AT THE PLANT ANOTHER FOUR YEARS IF THE STRIKE HAD NOT OCCURRED." Another quote-out indicates that the union involved is the UAW.

In the absence of an explanation from Contech management as to the reasons for the loss of MN-12, I find that this article, as reproduced in the Employer's campaign literature, takes on added significance and would tend to suggest to employees that the loss of MN-12 from their plant may have been related to the presence of the UAW.

- **The long-term agreement with TRW**

Rack & pinion housing castings for Contech's customer TRW represent about 90% of the output from plant #1, and about 15% of plant #3's work. Contech uses TRW's dies for manufacturing its castings. At the time of the filing of the petition Contech and TRW were just completing the fourth year of their five-year long term supply agreement (LTA), which expires on 12/31/95. Contech's Director of Sales and Marketing, Robert Davis, testified that within a few days after the petition was filed he had a meeting with TRW's Director of Purchasing Gary Mahon to begin negotiations for a successor LTA. Early in their meeting Davis told Mahon that Contech had been formally petitioned for a union vote. He testified that during the meeting Mahon said TRW wanted to postpone LTA negotiations until the union issues, along with some long standing quality and delivery issues between Contech and TRW, were resolved.

*Appendix E*

A November 18, 1994 memo from Davis to Division Manager Gary Walker about his meeting with Mahon indicates that TRW's decision to postpone was due to "issues at Dowagiac relative to the union" alone, and did not mention that quality and delivery issues were contributing factors. The explanation that TRW was holding off LTA negotiations because of the union vote was confirmed in Davis' monthly activity report to Walker two weeks later.

Plant #3 employee Shirley Stroud testified that in December, at a captive audience presentation in the conference room, Director of Manufacturing Joe Barry told employees that TRW wouldn't sign an LTA with Contech until after the election.

Employee Loisa Murray, who works in plant #1, testified without contradiction that Manufacturing Manager Brad Farver brought up the subject of TRW's attitude toward union suppliers in a captive audience speech to employees, and that he referred to a letter from TRW to Contech on the subject. Ms. Murray said that Farver indicated that TRW top executives didn't want to work in companies that had unions. Murray three times qualified this part of her recollection with "more or less," making it difficult to differentiate her recollection of Farver's statement from her subjective interpretation of what he said. Murray was clear, however, that after Farver's statement about TRW, employees in the meeting asked Farver to explain his comments why TRW would not want to deal with a unionized Contech, and that Farver did not elaborate. I do conclude from Murray's account that Farver told

employees that TRW had communicated a concern to Contech by letter about the possibility of a union there. I also conclude that this was a different group meeting of employees from the one that Shirley Stroud described, although it was possibly in the same series of meetings, and that it was again the company representative who brought up the subject of TRW's relationship with Contech as it introduced the *Guardian* video.

Joe Barry testified that at one of his late-December meetings with groups of employees, at which he showed the Guardian Glass video, he told employees that the LTA negotiations with TRW had been suspended "until we got some of our problems behind us." He didn't recall how the subject came up, and said that an employee might have asked about it. Manufacturing Manager Brad Farver testified that he was present for this series of meetings and that as part of his introduction to the video he told employees "to clarify rumors that have been floating around the shop floor that TRW has postponed long term agreements until our issues are resolved." Asked about what Joe Barry had said, Farver testified that Barry brought up the subject of the quality and delivery issues with TRW as part of his introduction to the video, and that he referred to rumors on the shop floor, and then confirmed that LTA negotiations had been postponed "based on those issues." Farver did not directly dispute the statements attributed to him by Murray.

I credit Farver's account only in that it confirms that he and Barry brought up the status of LTA negotiations as part of the introduction to the video. I specifically discredit his claim that Barry digressed to a discussion of quality

and delivery issues while introducing the video. In the context of a meeting called for the purpose of watching an anti-union video depicting strike violence, I accept Stroud's and Murray's credited recollection of their statements as the more accurate. Accordingly, I conclude that Barry and Farver put the onus for the postponement of the LTA on the presence of the Union and the election.

- **The rumored loss of a TRW part production**

Plant #3 production employee Tommy Lee Walker testified credibly without contradiction that within one to two weeks before the election he saw supervisor Mark Hunsberger stop and talked to employees on the line, one after the other. He said that each conversation lasted a few minutes. When Hunsberger got to Walker's line, he told Walker that the company was known for correcting its mistakes. Then Hunsberger told him the TRW had sent one of its dies to another company to see if they could run the part. There is no record evidence whether Hunsberger's report was accurate.

Based upon Walker's direct observation that Hunsberger had stopped to talk to 2 or 3 other employees on the line for about the same length of time before reaching his machine, and based further upon Walker's account that Hunsberger's comments were unsolicited, I find that it is reasonable to infer that Hunsberger made similar comments to other employees during this series of conversations. Even if he spoke to no more than Walker and the 2-3 other employees directly observed by this witness, given the nature of his comment that the Contech's largest customer

was trying out alternative suppliers, I find it probable that this report would have been widely disseminated throughout the unit.

The Barry-Farver comments about the postponement of LTA negotiations and Hunsberger's comments about TRW's trying out alternative suppliers were raised in the context of the Employer's anti-union campaign: Barry's and Farver's came at meetings called to watch a campaign video, Hunsberger's while he was talking about the company's ability to correct its mistakes. I find that by these statement in their context, employees would reasonably conclude that TRW's relationship with Contech was in jeopardy because of the union, and that the election could determine whether the LTA was renewed.

- **Late campaign statements by Zagotta and Walker**

A January 9, 1995, campaign letter on SPX letterhead to employees from President Al Zagotta informed employees that "(your) plant is at a very critical stage in its relationship with certain key customers like TRW, Ford and Saginaw. . . . I am concerned that if the Dowagiac plant develops a reputation for not being a dependable supplier — because of labor problems, a UAW-led strike, or even the possibility of a strike every time the contract comes up for renewal — our customers may become nervous and look elsewhere for another source for their parts." The record provides no objective factual support for Zagotta's implication that customers "become nervous" as a result of the mere presence of a union. The objective facts were that there were other reasons for the Ford NM-12 rack & pinion

part leaving Dowagiac, and TRW had additional reasons[4] other than the union drive for delaying renegotiation of the LTA.

In his 25th hour speech to the employees on January 10, 1995, Division Manager Gary Walker emphasized that he was "greatly concerned about the impact the union could eventually have on our customers like TRW and our ability to compete." Considering only the immediate context of his speech, this statement would not tend to interfere with the election. But in the already-described larger context of the campaign in which employees have been led by Barry, Farver and Hunsberger's conduct to believe that TRW and Ford were already retreating from their relationship with Contech because of the union, the statement tended to reinforce fear that a vote for the union could result in loss of work for Contech.

- **TRW's pre-election visit to the plant**

TRW's quality representative, Jack Fannon, visited both Plant #1 and #3 on January 9, and 10, 1995, and toured and inspected the production areas thoroughly. He was accompanied by an entourage of Contech managers and supervisors. The tour was highly visible throughout the plant. According to the agenda Contech prepared for his visit, Joint Exhibit 4(oo), the Plant #3 tour lasted two hours on the afternoon of January 9, from 1:45 p.m. to 3:45 p.m.

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4. Division Manager Gary Walker testified that TRW's concerns about the union did not supersede the long-standing concerns TRW had about quality of parts.

Plant #3, the larger of the two plants, has a shift change at 2:30 p.m., according to employee Danny Truelove, so Fannon's tour spanned both first and second shifts and was timed in such a way that its exposure to employees was maximized. The Plant #1 tour lasted an hour on the morning of January 10. He was still in the plant when Gary Walker delivered his series of 25th hour speeches.

The impression conveyed to employees by Barry's, Farver's and Hunsberger's comments described above could only have been further amplified by the January 9 and 10 plant visit by Jack Fannon. From Barry's testimony it is not clear who was responsible for the timing of this visit. I think it is immaterial whether the timing of this visit was first suggested by TRW or by Contech. Whether intentional or not, Contech allowed the visit during the last two days of the campaign, a time when its potential to affect the election would have been greatest. It followed and gave added weight to Zagotta's stated concern that customers would "become nervous." It coincided with Gary Walker's 25th hour speech and provided additional context for his stated concern about the TRW-Contech relationship and how it would be affected by the election.

I find that the Barry-Farver statements to the effect that TRW was holding up the LTA pending the election results, Barry's failure to explain the disappearance of MN-12, and Hunsberger's statements that TRW had pulled a part out of the plant, the Employer created an atmosphere where Zagotta's and Walker's end-of-campaign statements would have been understood as an implicit prediction that work and jobs would be lost in the event the UAW won the

election. The record does not show that this prediction is based upon objective facts beyond the Employer's control, and as such constitutes an objectionable threat. *Blaser Tool & Mold Co.* 196 NLRB 374 (1972).

- **Alleged threats to go out of business or close the plant**

As noted above, the Employer sought to associate unions with plant closings from its keynote distribution on November 17, 1994, to its videos, handouts, to the photographs of closed plants as explained by Dwayne Weber's January 10, 1995, letter.

The "*Flashback*" handout contains a full-size reproduction of a 1982 letter to then-General Manager of the Employer's plant, Dale Engel. It is from William Milford, the president of Scott Die Casting, Inc. The first sentence of the typed letter states: "Scott Die Casting, Inc., an aluminum die casting and machining operation, in Carlisle Ohio closed its doors last week due to union difficulties." In somewhat irregular and uneven lines, the words "Scott Die Casting, Inc." and "Carlisle, Ohio closed its doors last week due to union difficulties," are underscored. The words "union difficulties" are triple-underscored. The irregularity of the lines gives the clear and immediate impression that they are not original to the letter, but were added for emphasis in the distribution. This page is back-to-back with a reproduced notice of a public Auction for the Scott Die Casting equipment. This letter was also shown with the underscoring in close-up in the 25th hour video presentation to employees. On the back page of both and *Flashback*, and "*IT CAN'T HAPPEN*

*HERE*" in large print the Employer has printed this message: "SAY NO TO THE POSSIBILITY OF LOST CUSTOMERS, LOST JOBS, LOST PAY, LOST BENEFITS AND OTHER TROUBLES — VOTE NO."

The association of the UAW with plant closings and loss of jobs was brought home by Division Manager Gary Walker during his 25th hour speech to the employees. He reviewed the points the Employer emphasized in the campaign: "We feel we have accurately presented life in the UAW by giving you the facts . . ." He cites "the horrendous strike record of the UAW", "the 100's of closed plants in Michigan and the hundreds of thousands UAW members who lost their jobs . . . as a result of inefficient operation and UAW-led strikes." Then Walker talked about the years he has known the UAW and his "experience" with them:

> "From what I have personally seen, the UAW is always at the heart of conflict . . . Let me tell you my personal experience with the UAW and why I am so opposed to a union at this plant. I also want to tell you because *I don't want you to believe the union's campaign propaganda*[5] *that the UAW's relationship is so wonderful with Sealed Power.*" (Emphasis supplied.)

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5. The UAW's campaign literature included several newspaper articles and letters from Muskegon-area UAW locals describing a constructive and harmonious relationship between the UAW and management at other Sealed Power plants.

*Appendix E*

Walker then described three Sealed Power plants in West Michigan where unions had represented employees:

> "When I first joined Sealed Power in 1971, UAW Local 637 was on strike in Muskegon. Right after the strike, due to the fact the company wasn't competitive, the company closed the piston operation and bought the parts on the outside. We were so inefficient we could buy parts cheaper from outside suppliers. That strike issue was simply one of cost and not being competitive. As sad as it was, Sealed Power was forced to make a business decision in order to save the rest of the company."
>
> "Another business decision was made in 1987 when the company announced the closing of the Sealed Power Muskegon Machining operation. 400 UAW members . . . lost their jobs. Those jobs were lost due to the fact that we were no longer competitive. . . .
>
> "At the Sealed Power Ravenna facility near Muskegon, another unionized plant with a different union, the issue was once again the profitability of the business. The company and union reached an impasse during negotiations — the union called a strike in May, 1993. . . . Once the strike was over, the Union agreed to a contract that froze wages and dropped retiree medical benefits. . . . Only four months later, in February 1994, the Ravenna plant closed costing

105 people their jobs. *Because of these facts and because of what I have personally seen, I don't feel we need the problems often associated with a union in our plant at Dowagiac.*" (Emphasis added.)

The impact of this speech is analogous to a campaign poster used by an employer to show a correlation between employees selecting a union, exercising their right to strike and subsequent plant closing in *General Dynamics Corporation*, 250 NLRB 719 (1980). There the employer displayed a poster showing that the IUE had lost eleven representation elections at General Dynamics plants, and had won 3. It showed that there had been two strikes and two plant closings. The poster concluded with an exhortation: "Don't vote for a Loser." The Board held that the "loser" reference could be interpreted as a reference to the IUE's association with the plant closings. "The message conveyed to the employees through this poster was that the Employer had closed two out of its three plants where the (IUE) won representation elections, and that the same thing could happen at Camden." (p.720). By comparison, Gary Walker's 25th hour speech gave three examples of Sealed Power plants represented by unions, all three of which had been closed or lost jobs, two following strikes. His statement about the "problems often associated with a union" was a clear reference to the plant closings he had just described and would have had a similar impact on employees as the "loser" reference in General Dynamics' poster. General Dynamics in its speeches to employees pointed out that there are plants where the company and union have a successful bargaining relationship, and stated affirmatively that the

Camden plant would not be closed merely because a union won an election. The Board held that this was not enough to dispel the effect of the implicit threats in the rest of their campaign. Contech's disclaimers were weaker and fewer than those found in *General Dynamics*. Walker's only disclaimer in this speech was that he was not saying a strike would "automatically" occur if the UAW won the election. The second example of union shops closing made no mention of a strike. What all three examples had in common was that the employees were represented by a union, and Sealed Power closed plants or removed work.

Walker's speech went beyond merely showing that a union presence does not necessarily prevent plant closing or loss of jobs, a point that had been stated in some of the company's campaign literature up to this point. These comments were expressly offered to tell employees something about Sealed Power's "relationships" with unions: that the relationships were marked by strikes followed by "business decisions" to close plants, even where the union had agreed to concessions. The speech makes no effort to correlate the possible economic consequences of unionization and the closing of plants. Walker implicitly identified "the problems often associated with a union" as the cause for the loss of profitability, competitiveness and the resulting loss of jobs. An employer who implies the possibility of job loss through unionization must do so carefully "on the basis of objective fact to convey an employer's belief as to demonstrably probably consequences beyond his control." *N.L.R.B. v. Gissel Packing Co., Inc. et al.*, 395 U.S. 575 (1969). The Court observed in that case that, "employees, who are particularly

sensitive to rumors of plant closings, take such hints as coercive threats rather than honest forecasts." (Id. at 619-620). Walker's 25th hour speech left the impression that unionization and the exercise of the right to strike was a factor in the decisions to close plants, and so failed to meet this test. *Diner's Drive-In, Inc.*, 280 NLRB 971 (1986).

Walker's speech must be evaluated in the context of the Employer's campaign which constantly provided examples of plants closing where employees were represented by unions. His speech was followed by a video with a close-up of the Scott Die Casting "union difficulties" letter. As detailed above, the Employer's management at high levels conducted its campaign at the "brink" of overstating the objective facts linking unionization with the dire consequences of closed plants and lost customers. *Turner Shoe Company, Inc.*, 249 NLRB 144, 146 (1980). Unlike cases where other employers have spoken of their "experiences" with unions, Walker gave no assurances that Contech was not anti-union. Cf. *Atlantic Forest Products, Inc.*, 282 NLRB 855 (1987). I find that Gary Walker's 25th hour speech by itself and in this context implicitly threatened employees with plant closure and had a tendency to interfere with employee's free choice in the election. *General Dynamics Corporation, supra. Harrison Steel Castings Company*, 262 NLRB 450, (1982).

On the basis of the record, including the above credibility resolutions and findings of fact, I conclude that Objections Nos. 1 and 3 have merit and I recommend that they be sustained.

*Appendix E*

***Objection No. 2***

The Petitioner presented one witness, Kevin Whiteoak, who testified on this Objection. During the two weeks prior to the election, Whiteoak said, supervisors in the shop wore green, corduroy baseball style caps displaying the crossed-out initials of the UAW. At first, only the supervisors wore these caps, but then he heard a rumor that employees could obtain the caps for the asking at the personnel office. Bargaining unit employee Danny Truelove testified that he asked supervisor Steve Nunez for a hat, and received one. Truelove then decorated the hat with pro-union buttons.

An employer who asks employees whether they will wear anti-union campaign paraphernalia during the critical period may interfere with an election. In certain circumstances, this can be a coercive form of interrogation, since employees may be thereby forced to declare themselves on the issue of union representation. *Lott's Electric Co.*, 293 NLRB 297 (1989), *Horwath & Co., d/b/a Gonzales Packing Co.*, 304 NLRB 805 (1991). However, merely making these materials available to employee who request them is not objectionable. *Farah Manufacturing Co.*, 204 NLRB 173, 175 (1973).

There is no evidence here that the Employer went beyond merely making these caps available to employees who came forward to ask for them. Indeed, the record is void of evidence that supervisors or agents of the Employer affirmatively let it be known that employees could ask for the hats. The Petitioner has offered no evidence that any

supervisor or Employer agent solicited employees to wear hats or other anti-union campaign paraphernalia. Under these circumstances, the Employer's conduct is not objectionable, and so I recommend that this Objection be overruled.

***OBJECTION No. 4***

Testimony evidence in support of this Objection came from bargaining unit employee Al Groth, a member of the UAW in-plant organizing committee. He testified that on the Monday before the election third shift die cast supervisor James Rank initiated a conversation with him about the upcoming election. He recalled Rank stating that it appeared that the election would be close, to which Groth replied that the Union was in pretty good shape. Under direct examination Groth testified that Rank then said that if the Union did win, the company would not honor the election or negotiate a contract with the union. Under direct and cross examination, Groth stated that this conversation was preceded by a discussion[6] between him and an unidentified co-worker about the significance of the posters and photographs of closed plants displayed in the plant by the Employer. Groth said that the earlier conversation caused him to be upset or irate that the Employer's campaign

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6. From transcript p. 82, ln. 24 to p. 83 ln. 18, it is not clear when Groth is describing his conversation with Rank and when he is describing an earlier conversation with another employee. (See Attorney Kok's cross-examination of Groth at p. 92.) Accordingly, the statement at p. 83, ln. 4-5, ". . . he was saying that the company would move because of the Union," has not been clearly attributed to Rank or any other Employer agent.

literature had "insinuated" or "implied" that unions were to blame for plant closings. Under cross-examination Groth acknowledged that Rank might have said only that there was no guarantee that the union would get anything in negotiations.

In his testimony, supervisor James Rank recalled this conversation occurring on the morning of the election. His account of the preliminary discussion is consistent with Groth's. However, he denied saying that the Employer would not bargain in good faith, or that the Union would never get a contract. Instead he maintained that he had said everything would have to be negotiated and there was no guarantee that the company and union would agree on bargaining points.

To the extent that Groth's and Rank's testimony conflicts on this issue, I credit Rank, whose testimony was both more clear and more consistent. I find, relying upon Rank's testimony and Groth's acknowledgment under cross-examination, that in this conversation Rank did not say the company would refuse to honor bargaining in good faith, or that it would refuse to negotiate a contract with the Union if it won the election.

I conclude that the Petitioner has failed to adequately support this Objection with evidence, and accordingly, I recommend that it be overruled.

***OBJECTION No. 5***

The Contech Employee handbook (Employer's Exhibit 2) contains the shop rules that were in effect during the

critical period. Among the rules is a ban on "unauthorized distribution of literature except during nonworking hours (unpaid time or scheduled breaks) in nonworking areas as is protected by the National Labor Relations Act." (p.64). This facially valid rule would permit the distribution of union campaign literature in the lunchroom of each plant. The first and second shifts each have an employee whose job it is to daily cleanup the lunchrooms in both plants. The job descriptions of both supervisors and production employees, as well as the shop rules, require that they promote plant-wide housekeeping. Some supervisors regularly take their lunch and breaks in the lunchroom, along with production employees. The Employer has allowed employees to leave newspapers, magazines, a Bible, and Avon catalogs on lunchroom tables for other employees to read.

The Employer posted or hand-distributed about thirty pieces of literature to the employees in the bargaining unit during the campaign. The usual means of distribution was for the supervisors to give it to employees at their workstations. The Union, on the other hand, distributed its campaign literature at its off-site meetings, but some employees would then bring the union's literature to work and leave it on the lunch room tables in stacks or in single sheets, for other employees to find and read.

Plant #1 third shift employee Al Groth testified that on at least two occasions he witnessed supervisor Jim Rank pick up union literature from the lunch room tables and throw it in the trash. One of these occasions was in December, 1994, about a week before the holiday shutdown,

clearly within the critical period. On other occasions he observed that union literature left in the break room disappeared after Rank had been there.

Rank acknowledged that it was his practice to clear the lunchroom of campaign literature when he went to the lunchroom for his coffee, something that he did up to twice each shift. He didn't keep count of the number of times he did this, and could not estimate it. If it was "unattended," he said, he put it in the garbage. He recalled once asking some employees seated at a table with some of these papers if the literature was theirs, or if they were reading it. When they said no, he threw it away. Rank's explanation was that he was indiscriminate, gathering up both the union's and the company's campaign literature. However, he did not dispose of the Avon booklets or magazines, even though they were also left on the lunchroom tables by employees, because employees' names appeared on those items, he said.

Two plant #3 employees, Shirley Stroud and Roddy Green, testified that they saw first shift supervisor Ila Aurand throw out union literature. Green recalled that about a week before the election, he saw Aurand pick up a stack of 25-30 pieces of union literature and put them in the trash. Stroud testified that during the week preceding the election, she and co-worker Barb Singleton were seated at a lunch room table during a break, and that Aurand was seated at the opposite end of the same table. Stroud took a piece of union literature out of her folder, showed it to Singleton, and then pushed it across the table to the other side, leaving it for someone else to find and read. When Aurand finished her break, she picked up the literature Stroud had placed there, and threw it away.

*Appendix E*

Supervisor Ila Aurand indicated that because this piece of literature had been left on the table, and no one was reading it when she finished her break, she regarded it as "litter" and threw it away with her coffee cup and napkin. Aurand stated that anytime she found "unattended" campaign literature in the lunchroom, she threw it away. Like James Rank, she did not disturb the Avon booklets or magazines. Aurand also ignored newspapers left in the lunchroom by employees, unless their tattered appearance indicated they were old.

Plant #3 production technician Danny Truelove testified that in December, 1994, he was working during the second shift. While in the breakroom, he saw second shift die cast supervisor Jim Humphrie cleaning up the tables. Humphrie put magazines on an end table, but the union literature that was laid out on the tables he gathered up and threw in the trash barrel.

Supervisor Jim Humphrie testified that this instance was the only time during the campaign that he disposed of campaign material found in the lunchroom. Other times he left the literature on the tables, but this time, he said the table was "a mess" with "all kind of papers, candy wrappers, everything on the table." The campaign literature, comprising 15-20 pieces of company and union distributions, was scattered on tables throughout the lunchroom. Humphrie cleared the table and threw out the campaign literature. Danny Truelove was called again to rebut Humphrie's account that the lunchroom was exceptionally messy when he cleared the tables. He added that as Humphrie went through the lunchroom, he placed

magazines on an end table, but that the threw out the union campaign literature.

Truelove also testified without contradiction that two days before the election another supervisor, die cast foreman Mark Hunsberger, picked up a single piece of union literature after Truelove placed it on the table, and then left the lunchroom with it.

The incidents described involve four different supervisors of the Employer, at both plants, and on all three shifts. Two of those supervisors, Aurand and Rank, admitted that during breaks they cleared campaign literature from the lunchroom routinely. It is immaterial that the union literature was not attended or guarded by employees when confiscated and disposed of by these supervisors. The Employer's distribution rule imposes no such condition, and this test was not applied to the other reading matter. As indicated by Shirley Stroud, leaving copies of literature on lunchroom tables, whether in stacks or single sheets, was a means of forwarding it to other employees who would come to the lunchroom later. Current newspapers, magazines and Avon booklets were not disturbed, indicating that the supervisors understood this. The supervisors' explanations for their conduct are not credible. Rank and Aurand tried to distinguish the campaign literature from lunchroom magazines on the basis that the latter had the names of employees on them. Aside from the coercive effect of requiring individual employees to put their names on union literature they want to distribute, this seems too fine a distinction from supervisors who did not differentiate current campaign literature from candy wrappers, used coffee cups and napkins.

*Appendix E*

Discriminatory confiscation of union campaign literature during the critical period by Employer agents can constitute election interference. It conveys that the Employer will not tolerate lawful distribution of union literature, while simultaneously permitting other types of literature to remain. *Jennie-O Foods, Inc.*, 301 NLRB 305, 338 (1991); See also *Vemco, Inc.*, 304 NLRB 911, 927 (1991). In its closing argument at the hearing, the Employer cited *Genessee Merchants Bank & Trust Co.*, 206 NLRB 274, 275 at ftn. 10, an 8(a)(1) case, to support its claim that its supervisors were merely cleaning up litter. The footnote cited states, "Respondent can prevent the distribution of literature which occurs in such a manner as to cause litter. *Erie Marine, Inc.*, 192 NLRB No. 119." Both *Genessee* and *Erie* involve unfair labor practice 8(a)(1) issues, and not the more restrictive test of objectionable conduct interfering with the "laboratory conditions" of a representation election. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1787 (1962). Moreover, *Erie* concerned the maintenance and enforcement of a written no-distribution rule expressly aimed at curbing litter.

The Employer's conduct here was neither isolated nor de minimus. There is no evidence that Employer corrected, disavowed, or minimized the impact of this conduct during the campaign. Cf. *United States Aviex Co.* 279 NLRB 826 (1986).

I recommend that this Objection be sustained.

**OBJECTION NO. 6**

The Petitioner argues that, because the polling took place in the plant #1 conference room, the same room where

the Employer had conducted its captive audience meetings and where it had shown its campaign videos, the atmosphere of the election was tainted. There is no dispute that the conference room selected by the Board Agent for the polling area was where the Employer conducted its meetings. The parties stipulated that the Union's organizer expressed to the Board agent an objection to the selection of the conference room on grounds consistent with this objection.

The Union's witness, Kevin Whiteoak, testified that on the day of the election, all campaign material had been removed and that only the Board's official election notices remained posted. There is no evidence or claim that the secrecy of ballots was compromised or that supervisors were present in the voting area while the polls were open. The Tally of Ballots reveals there was a 97% turnout. Under these circumstances I find that it is too speculative to conclude that the location of the voting area in the conference room could have affected the results of the election.

I recommend that this Objection be overruled.

## SUMMARY OF RECOMMENDATIONS

I recommend[7] that Petitioner's Objections Nos. 2, 4 and 6 be overruled. I further Recommend that Objections Nos. 1, 3 and 5 be sustained and that the Board direct a second election.

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7. Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board in Washington by May 1, 1995.

*Appendix E*

Dated at Grand Rapids, Michigan, this 17th day of April, 1995.

s/ Thomas M. Good
Thomas M. Good, Hearing Officer
National Labor Relations Board
Room 330, 82 Ionia N.W.
Grand Rapids, Michigan 49503

## APPENDIX F — EXCERPTS FROM TRIAL TRANSCRIPT OF ROBERT DAVIS

[Commencing at page 263]

* * *

Q Who specifically called you?

A Gary Mahon, their director of purchasing for North America.

Q And when did he call you to do that?

A Roughly, November time frame.

Q And did he request that you meet with him face to face?

A Yes.

Q And where was that meeting scheduled?

A At his office in Sterling Heights, Michigan.

Q I assume you attended the meeting.

A Yes.

Q And who was there?

A Myself and Gary Mahon.

Q Could you tell us what the discussion was?

A The discussion started off, before we got involved with the LTA, I had informed him that we had been formally petitioned for a union vote. That's the first information I had given him in regards to the union situation.

Q And then what happened?

A He had told me that in, in view of the current situations, within the context that he would like to postpone our long-term agreement negotiations until our issues in house were resolved [264] or the union issues were resolved.

Q Okay. I'm going to show you what's been marked as Joint Exhibit 4-ZZ. Can you take a minute to identify this, please?

A Yes. This is our long-term agreement with TRW.

Q And this is the agreement that would expire in December of 1995?

A Correct.

Q And the purpose of the meeting was to do what with respect to this document?

A To extend it.

Q At the conclusion of the meeting, did you advise senior management at Contech about TRW's position on negotiating the long-term agreement at that time?

A Yes, I did.

Q Did you do that by way of a memo?

A Yes, I did.

Q And who is the memo directed to?

A To Gary Walker.

Q I show you what's been marked as Joint Exhibit 4-XX. Would you take a moment to identify that?

A Yes. This is my memo.

Q Now, I note on here that it's dated 11/18/1994.

A That was — yes, that's correct.

* * *

[266] * * *

Q Why is it important that you negotiate with each other roughly a year in advance of expiration?

A Well, projects and programs that we deal with are usually a few model years in advance. So things that we're working on the design and new builds, it kind of keeps it rolling on a smooth plane instead of waiting until the last minute and having new jobs that would come in maybe a year or two later going out for bid to other customers.

*Appendix F*

Q Is TRW a significant customer for you, that is to say, for Contech?

A Yes, they are.

Q Okay. Can you estimate how much of the production capacity of each of the plants is devoted to TRW work?

A Within Plant 3, it's roughly, at that time, 90 percent; and in Plant 1, maybe — and I'm guessing — maybe 15 percent.

MR. KOK: No further questions.

* * * *

## APPENDIX G — EXCERPTS FROM TRIAL TRANSCRIPT OF JOSEPH BARRY

[Commencing at page 279]

* * *

Q Would you describe these problems as serious?

A Yes, I would.

Q Why?

A Because, as we know, TRW is a major customer of ours, and the problems were critical problems of casting defects getting out of our facility, getting into the TRW Rogersville facility causing problems for the TRW customer inside of their plant.

Q What is the product that we supply to TRW?

A Rack-and-pinion steering housings for a number of, of automotive applications.

Q Are these safety components?

A Somewhat, yes.

Q TRW; what does it take from us, and what does it make and turn over to the ultimate buyer?

A It takes from us a rack-and-pinion steering housing. It does the machining operations, does the gear buildup, and provides a complete rack-and-pinion steering mechanism to the automotive assembly plants.

*Appendix G*

* * *

[282] * * *

Q Could you give us the time frame that you're telling us?

A Through the summer months and, and into the fall, we began to make some of those, those improvements, from a delivery standpoint.

The greater problem, obviously, was the quality issues. Those quality issues, for me, personally, even though we had been involved all through the summer and into the fall, began to come to a head in, in late-October and early November. Specifically, we were called to a meeting on November 14, which I remember very well, in Rogersville, Tennessee.

Q Who called you to that meeting?

A Jack Fannen, Rod Burr, and Steve Strickland.

Q And who are those people?

A Those are all people in, in the quality area.

Q They work for whom?

A They work for TRW in Rogersville, Tennessee.

Q So they demanded you come down to Rogersville?

A Yes, sir. Several of us went there for that meeting.

[283] Q Who were those people?

A Myself, Bruce Chambers, our quality manage for Plant 1; Kevin Case, our quality manager for Plant 3; I believe Paul Brancaleon, our engineering manager, was also with us.

Q What was the subject of the meeting?

A They wanted to address — wanted to know where we were and what we were doing in terms of addressing the quality issues. Why I remember that meeting so well is they had specific castings, casting defects on the table, and we reviewed all of those in that meeting.

Why I know it was critical, we had — Walt Canour, was, was in that meeting. He is TRW plant manager. I believe he is responsible for all four TRW plants. He presented one casting to me that had an excessive crack in it, and said, Joe, how would this casting ever get out of your plant?

They demanded to know what kinds of actions that we were going to do to solve our problems, specifically, what were we going to do immediately to contain our problems internally until we were able to find ways to, to find route-cause corrections to our problems. So, during that, that meeting we talked to those kinds of things.

When we returned from that meeting on the night of the fourteenth, on the fifteenth, because it was such a critical

nature, we made that situation extremely clear to everyone in our plant.

[284] Q. How did you do that?

A We had specifically plant meetings that, that people came to, specifically in Plant 3 because that's where most of the TRW product was produced. Specifically in that plant, we had those meetings in the break room. We had one meeting per shift. We talked about the critical nature of where we were with TRW, what our concerns were.

We had actually brought home some of those same castings that were presented in the TRW meeting, and we had each of us touch and feel those castings so we all had a good sense of what were those problems, specifically.

Q What steps did you taken thereafter, then, to deal with this?

A We implemented 100-percent reinspection.

Q What is that?

A Once, once a casting is produced, going through the normal inspection — in-process inspection checks, we implemented to ladies per shift that were assigned — that knew — that we felt knew the quality standard extremely well. They were assigned to reinspect castings for specific defects, specific problems that we had been having in terms of defects.

So every TRW part that left our facility was, by those six ladies, two per shift, was reinspected 100 percent for possible or excessive solder drags, the kinds of problems that were getting out of our plant. That was our short-term action to [285] stop — try to stop the problem from getting out of our plant and buy us more time to solve those problems and protect the customer along the way.

Q What other steps did you take thereafter to deal with this?

A We, we had already begun to implement a number of quality systems changes, and we had been working through that most of the summer and fall. We continued to take corrective action on some of those systems that we knew were not doing what we thought we were doing — thought they should be doing.

Some of the other things that we would have done, we implemented kinds of things to — for example, parts segregation. We implemented technology on the machines and equipment that it could produce a casting out of a process parameter that had been spelled out, if it was outside of that window, a machine would actually throw the part away.

We were doing a number of things to try to protect the customer and, number one, keep our problems internal to Contech.

Q Did there come a time when TRW asked to observe what you were doing in this regard?

A Yes. How that happened, when I was at TRW on November 14, I committed to them that we, in fact, were committed and focused to doing the right thing for the customer and, and going in the right direction. As part of that commitment, I [286] stated that I would return on a monthly basis myself to TRW and report to them our actions and what was working and what was not working, where were we going, and those types of things.

When I returned for the December meeting — and that was probably somewhere between the 14th and 16th of December; each meeting is somewhere around that time frame, the middle of the month — when I returned for that, I felt very positive that we had done a number of good things internally.

We had packaged some things that we wanted to prove to TRW that we had found root causes and we had taken corrective action during that time, and we wanted to close out those as, as open issues.

When we discussed how would we formally close out those kinds of issues, TRW said that the way that that would happen is that Jack Fannen would come into our plant — he is a quality person from the TRW Rogersville plant — that he would come into our plant, and he would, in fact, review those corrective actions and assure that, that they were in place and he felt comfortable with where we were going.

Q And did this, in fact, occur?

A Yes, it did.

*Appendix G*

Q And when did it occur, and how did it come about?

A That occurred very early in, in January just after the first of the year. Jack was — I don't recall the dates, but it was very early after the first of the year.

* * *

[292] * * *

Q Now, are you sole sourced at TRW on most, if not all, of these parts?

A I believe that we are, yes.

Q What does "sole source" mean in the automotive industry?

A Sole source would say — if we are a sole source, I would say that we are the only supplier on that part. Any of the ties or tools that are owned by TRW, we have all of those in our possession. If we cannot supply those parts, then they are not getting any parts from anywhere else.

Q And that will then shut them down?

A Yes, it would.

Q And, in turn, shut their customer down?

A Yes, it could.

Q How long would it take for Plant 3 to be shut down to cause work stoppages at TRW? If that plant stopped shipping tomorrow, how long would it take before TRW would shut down in Rogersville, for example?

A A maximum of four days. In some cases, one or two days.

Q At the meeting, the audit where Jack Fannen came on or about January 10, did he come by himself from TRW?

A Yes, he did.

Q Was there anybody else representing TRW that was part of the audit or took a tour through the plant?

[293] A No. Jack was by himself, but we had also brought in Jim Balm, our divisional sales person, because he has — he also had very close contacts with Jack in the past so — but from TRW, Jack was the only person.

Q I show you what's been marked as Employer's Exhibit 6. It's three pages. Could you briefly review those and, if you would, identify what those are and how they are used?

(Document marked for identification as Employer's Exhibit 6.)

A Okay. The first one is a, is a graph or a bar chart that demonstrates the number of quality rejects or quality alerts that we have that we have received from a customer during a specific month, and it shows, shows January through

December, with a great increase in, in that frequency between the September, October, and November time frame.

Q And that's what year?

A That's 1994.

Q Okay. Before we leave that first sheet, with each month there are two bar graphs. The blank one is labeled "IRS-ERRS." What is that? What does that mean?

A Those are inspection rejects or problem reports.

Q What are those things?

A Those are actual rejects or — basically, those are all rejects from the customer. Those are castings or parts that have actually left our plant and gone into our customer's facility and defects that have been picked up by the customer [294] at their facility.

Q Are those serious problems?

A Yes, they are.

Q And then, the next bar graph in a given month has lines, diagonal lines, and it says "QA Issue." What's that mean?

A Those are, those are quality alerts. Those are less serious than the IRs. They're still a serious concern to us. Many of those may come more in the way of a phone call that the customer is having a problem, experiencing a problem but it's not yet as a critical nature as an inspection reject.

*Appendix G*

Q Okay. So the — and this particular chart; does this deal with any particular customer?

A Most all — these are all external, anything that has gotten to the customer, but primarily all of these external issues have been coming from TRW.

Q Okay. So then in the fall here of '94, you see the white graph go up in September —

A That's right.

Q — the 13 IRSs and then 17 in October and 16 in November, and then it drops December the seventh.

A That's correct. And these kinds of — the increase in frequency on this graph is specifically what drove the November 14 meeting.

* * *

[299] * * *

Q When did that part come to Dowagiac to be produced, and [300] under what circumstances?

A I believe that may have been about a year ago. I'm not certain of the time and when it first came to Dowagiac. It was currently, initially that job was kicked off in our Auburn, Indiana facility.

*Appendix G*

As the Auburn facility grew in terms of more requirements from the customer and additional parts coming on, we had discussed the opportunity to move a couple of jobs out of the Auburn facility and into the Dowagiac facility. And, I'm not exactly sure what that timing was, but I think that may have been a year or so ago.

We did that to basically free up some capacity in the Auburn, Indiana facility and at that particular time, we had open capacity in the Dowagiac facilities.

Later, during that negotiation — if you need to use that word — during that time frame, Ford was, we had some our factories that are focus factories. Specifically, Auburn is a plant that is primarily focused on Ford Motor Company with ship point, to Indianapolis.

Indianapolis people felt very comfortable with the quality and delivery coming out of Auburn. They were very reluctant to have pull that NM-12 job out of Auburn and send it to Dowagiac, just based on their comfort was with the Auburn operation.

During that time that we were discussing that situation, I assured Carl Fisher, who's in production control, material [301] control in Indianapolis, that as quickly as possible I would get that moved back into the Auburn facility, as quickly as they could handle it. During that time frame, I needed to make a commitment that I would do that by the end of 1994.

Q Do you meet that commitment?

A We began in December, looking at how to move that back out of the Michigan project, Michigan plant, and into the Auburn facility. Our budgeting and operating plans for '95 were complete then.

We felt that we had, based on what our projected sales lines was going to be in Auburn, we felt that we had open capacity. I was trying to look to my commitment, so we were very aggressively pursuing moving it out of the Dowagiac Plant and into the Auburn Plant.

I believe that Auburn didn't actually start to pick up any volume, on return of that part into their plant, until January of '95.

Q So it started slowly, then built up?

A Basically, for the most part of that, that's a one-die, one machine kind of operation full-time. So we were moving some dies and I believe we had three dies at Dowagiac. We had three dies on that program at that time. We moved, I think, one of those over there to help them get ready. They actually took responsibility for manufacturing that part, I believe on January 2nd or 3rd.

* * *

[303] * * *

Q At that meeting was there any discussion about TRW and the Union?

A At that meeting, we had mentioned that the long term agreement negotiations had been suspended in terms of, until we got some of our problems behind us.

Q How is it that that came up in the meeting, if you recall?

A I'm not certain, that may have been a response to a question.

Q Okay. Did you say anything other than just what you've testified to?

A No, sir. As it related to what? I'm not certain I'm following you.

Q To anything having, relating to TRW to the Union organizing drive other than the comment you've just testified to?

A No, sir.

Q Prior to the showing of the video tape, did you make any comments about strikes and/or violence associated with strikes?

[304] A Yes, I did.

Q And what were those comments, sir?

A I believe that I introduced the video at multiple meetings during that one to two day period. I think, I believe that I introduced everyone of, at every meeting, I did the

introduction. And one of the things that I specifically spelled out that this particular video showed some strikes and violence that happened in one specific incident, that we were aware of, that was the Guardian Glass situation.

I was very specific to state that — my words were something to the effect that "I'm not saying that a strike will happen here. I'm making everyone aware that these are things that can possibly happen."

Q Did you say the same with respect to violence?

A Basically my intent was as far as — anything that you're going to see on this video.

MR. KOK: No further questions.

* * * *

## APPENDIX H — EXCERPTS FROM TRIAL TRANSCRIPT OF JAMES RANK

[Commencing at page 195]

* * *

Q All right. Is it part of your job to tidy up, Mr. Rank?

A Part of my job is to keep the whole plant clean plus take and clean up, you know, anything I should leave myself, discarded material. That includes the whole plant. We have what we call visual management. We tour mornings, and I'm held responsible for how the plant looks, yes.

Q I show you what's been marked as Employer's Exhibit 3. Would you review that, please?

A Okay. I'm familiar with this.

Q I'm sorry. I couldn't hear you?

A I'm familiar with it, yes. Every year I look at it, when I get my review.

Q Okay. This is your job description?

A Yes, sir.

Q This is given to you by the company to tell you what your responsibilities are?

A Yes, sir.

MR. KOK: I offer it into evidence.

HEARING OFFICER: Any objection?

MR. FAYETTE: No objection.

HEARING OFFICER: Received.

(Document marked Employer's Exhibit 3 was received in evidence.)

[196] Q BY MR. KOK: I direct your attention to paragraph eight on page three, is that the responsibility that you were referring to?

A Yes, it is.

Q Now, have you, from time to time, cleaned up break rooms other than in this event?

A Yes, sir.

Q Would this be before the union showed up on the scene?

A Yes, I have.

Q During the time when the union was organizing?

A Yes, I did.

Q After the union organized?

A Yes, I still do.

* * * *

## APPENDIX I — EXCERPTS FROM TRIAL TRANSCRIPT OF ILA AURAND

[Commencing at page 222]

Q Would you spell that, please?

A I-l-a, E-v-e-l-y-n, A-u-r-a-n-d.

Q Where do you work, Ila?

A Contech, Dowagiac, plant three.

Q How long have you worked there?

A Twenty-nine years, next month.

Q What position do you now hold?

A I am quality supervisor.

Q How long have you held that position?

A A year last January.

Q How long have you held that position again?

A I was made a supervisor in January, 1994.

(Document marked for identification as Employer's Exhibit 5.)

Q BY MR. KOK: I show you what's been marked as Employer's Exhibit 5. Would you take a moment to review that?

A Yes. This is my job description.

MR. KOK: I offer it into evidence.

HEARING OFFICER: Any objection?

MR. FAYETTE: No objection.

HEARING OFFICER: Received.

(Document marked Employer's Exhibit 5 was received in evidence.)

Q BY MR. KOK: Okay. I direct your attention to paragraph 16, would you review that, please?

A That simply states that I am responsible for plant-wide [223] safety and housekeeping.

Q That includes housekeeping obviously?

A Yes.

Q From time to time have you had occasion to pick up or clean up the break areas in the plant?

A Yes, I have.

Q What shift do you work?

A First shift.

Q And how long have you worked the first shift approximately?

A I think I worked — it would only have been about two years out of the 29 that I've been there that I haven't been on the first shift.

Q And have you worked in the same plant during that time?

A No, I worked plant one until last July.

Q Now, you were here for the testimony yesterday and today?

A Yes.

Q You heard the testimony of Ms. Stroud?

A Yes.

Q Okay. She discussed something she witnessed at the plant three break area? Do you recall that?

A Correct.

Q Okay. Were you in the plant three break area at or about the time she testified to?

A Yes.

* * *

*Appendix I*

[230] * * *

Q All right. Well, that included union literature?

A Including union and company literature.

Q All right. You threw away company literature?

A And any other litter I found.

Q Okay. You never retrieved company literature to take back to human resources or wherever?

A No, I did not.

Q You always threw it away?

A Yes.

* * * *

## APPENDIX J — EXCERPTS FROM TRIAL TRANSCRIPT OF DANNY TRUELOVE

[Commencing at page 140]

Q Okay. And that's where they're normally kept, when people aren't using them?

A Yes.

Q Okay. And then he cleaned up the other paper that was on the table or tables?

A Yeah, the union literature.

Q Whatever it was. He picked it all up, didn't he?

A Yes, he did.

Q And whatever that was on those tables, he put in the trash?

A Yes, he did.

Q Now, those break rooms throughout this campaign had a lot of literature in them from time to time, didn't they?

A From time to time they did.

Q You were here yesterday for the testimony?

A Yes, I was.

Q You saw us go through union campaign material?

A Yes, I did.

Q And all the way from Joint Exhibit 2A to 2QQQ? Do you remember that?

A I believe that's it.

Q All right. A lot of stuff from the union, right, and a lot of that stuff was left in the break rooms each and every day, isn't that true, virtually every day?

A Well, quite often.

* * * *

## APPENDIX K — EXCERPTS FROM TRIAL TRANSCRIPT OF JAMES HUMPHRIES

[Commencing at page 319]

* * *

Q Could you be more specific as to what was on the tables?

A There was company literature, union literature, candy wrappers.

Q And were there other people in the room when you did this?

A I believe there was two other people in the room. I cannot tell you who they was. I don't recall. I just recall there being two people there.

Q And so you cleaned it all up?

A Yes.

Q Okay. Do you consider that part of your job?

A Yes.

Q Do you do that from time to time?

A Yes.

Q Had you done that prior to November 14, 1994?

A Yes.

*Appendix K*

Q Had you done that after January 11, 1995?

A Yes.

Q When is the last time you cleaned up?

A I'd said two weeks ago.

* * * *

## APPENDIX L — EXCERPTS FROM TRIAL TRANSCRIPT OF BRAD FARVER

[Commencing at page 343]

Q Do you recall his testimony with regard to a meeting of, I guess, a series of all employee meetings held approximately one week prior to Christmas?

A Yes, I do.

Q It was a meeting that was described as having a video tape that dealt with some strike related problems of Guardian Glass?

A Yes, I do.

Q Were you present at that meeting?

A Yes, I was.

Q And you heard Mr. Barry's testimony with respect to how that film was introduced?

A Yes, I did.

Q What do you recall was said at that time?

A We introduced the video and then in conjunction with introducing the video, they talked about the TRW issues on quality and delivery. They also announced that there were, or heard that there were rumors on the floor. They were talking about the postponement of the long term agreements and they told them that yes, they had been postponed based on those issues.

Q Was there any further discussion of any kind with respect to TRW?

A No, there was not.

MR. KOK: No further questions.

CROSS EXAMINATION

[344] Q MR. FAYETTE: Mr. Farver, at what meeting did this, the exchange take place?

A I believe it was the meeting prior to the Guardian Glass video.

Q The day you showed the Guardian Glass video?

A Correct.

Q And that was the second video you showed, is that correct?

A To my recollection, yes.

Q And who was speaking at this for management?

A Joe Barry, Duane Webber, and I was also present in that meeting.

Q But who actually spoke for management?

A I think all three of has had some comment.

*Appendix L*

Q All right. Now the issue concerning TRW came up how?

A As an introduction to the video.

Q Okay. And who spoke about that issue first?

A I believe Joe Barry or myself did.

Q You don't remember who talked about it first?

A No. There was a number of videos, so I don't remember.

Q There was — what do you mean there was a number of videos?

A I showed a number of video in December.

Q Okay.

A And I don't remember each and every one of them

[345] Q But in this particular instance, you're talking about the TRW long term agreement.

A Uh-huh.

Q Do you recall who spoke about that first?

A Either the, myself —

Q You or Joe Barry?

A No, I don't remember. It was either one of, Joe or myself.

Q Well, do you remember what you said?

A When I talked?

Q Yes.

A I introduced the video as the Guardian Glass and said to clarify the rumors that have been floating around on the floor that TRW has postponed long term agreements until our issues are resolved.

Q Is that the first the mention of TRW came up in that meeting?

A Yes.

MR. FAYETTE: Thank you. No more questions.

MR. KOK: No more questions.

* * *

[348] * * *

Q Now did there come a time where you took literature out of the trash can?

A Yes, I did.

Q And were there any supervisors in the room when you did that?

A Yes, there was.

Q And what did you with it?

A I placed it back on the table.

* * * *

## APPENDIX M — EXCERPTS FROM TRIAL TRANSCRIPT OF GARY WALKER

[Commencing at page 333]

DIRECT EXAMINATION

Q MR. KOK: What is your name, sir?

A Gary Walker.

Q And where do you work?

A At the Contech Division of SPX Corporation.

Q At what position do you hold there?

A I'm the Division President.

Q How long have you held that position?

A For 10 1/2 years.

Q And what does that position require you to do?

A I'm responsible for the overall profitability of the division, growth, sales. I oversee basically the entire operation of Contech.

Q Directing your attention, Mr. Walker, to November of 1994, did you receive a phone call on or about November 21, from a Walt Nower or Newer?

A Walter Canour called me on the 21st of November.

*Appendix M*

Q Okay. And who is Walter Canour?

A He's the General Manger of the steering and suspension, or the steering gear division of TRW.

Q And who is TRW?

A TRW is a customer that makes rack and pinning steering gears among other things, for the automotive industry, and is a major customer of ours.

Q Okay. Mr. Canour would be the highest responsible party [334] you deal with from TRW?

A Yes.

Q And did you attempt to put in writing the essence of your conversation with Mr. Canour in a memorandum?

A Yes.

Q I show you what's been marked as Joint 5, WW, which has been stipulated into evidence. Can you identify that, please?

A Yes, that's a memo from me to, basically, our sales staff regarding a phone conversation I had with Mr. Canour that day.

* * *

*Appendix M*

[337] * * *

Q Now you wrote and you spoke the following words, "I'm also greatly concerned about the impact the Union could eventually have on our customers like TRW." Is that words you said?

A Yes, yes.

Q Now Mr. Fannen was in the plant at the time you said that?

A Yes.

Q Did you explain to the workers, at that meeting, what you meant by the impact the Union could eventually have on our customers like TRW?

A What I said in that meeting is reproduced on that piece of paper. I said nothing more, nothing less.

* * * *

## APPENDIX N — EXCERPTS FROM TRIAL TRANSCRIPT OF PAUL BRANCALEON

[Commencing at page 256]

Q Now, would you tell us about that conversation?

A I went into the tool room, and Kevin was out there, and I asked him to come into the office where we could talk for a few minutes. He came in, and I asked him what had happened the previous Sunday. He didn't tell me anything. I then told him what Link had told me, that there was a meeting, and I then proceeded to tell him about the other two companies that I'm aware of in die casting that have unions, and that was Latrobe Die Cast and Pace Die Cast.

Kevin then became agitated, I guess. He then said, This place is probably bugged; let's go outside. And "outside," to me, was outside the office. We then proceeded to walk outside. He then continued walking outside the building. We then walked outside the building. He then proceeded to tell me that I could not talk to him about these things, and he went on and on about all the things I could and couldn't say. That was pretty much the end of our conversation.

Q What exactly did you tell him about Latrobe and Pace?

A I told him that Latrobe was a union shop and that they had sold the business to Pace and that Pace had run TRW business and that — I spent a week at Pace, and I told him — about that and that Pace subsequently lost the business to us.

Q You said you spent a week at Pace?

A Yes, I did. A customer at TRW had a problem with an end truck casting, a 25/25 casting, and upon Gary Walker's request, [257] I put a team of individuals together, myself, my tooling supervisor, — Duane Fairley, our toolmaker, Dan Ruslander, and the process engineer, Ron Neil, and we then flew to Pace in Monroe City, Missouri. We spent a week there.

We flew out Friday night, and we spent, spent through Wednesday, my whole team did. We rejected the casting, reevaluated the process, got the parts running. I sent my team home on Wednesday, and then I stayed from Wednesday to Friday of that week, and I went home that Friday.

Q Now, did you convey to Mr. Whiteoak anything about TRW, the Union, and Pace and/or Latrobe?

A I don't understand the question.

Q Well, you've indicated that you told him you went to Latrobe.

A No, that I went to Pace.

Q That you went to Pace. You talked about Latrobe and Pace in the conversation about the fact that there had been a union meeting.

A Yes. And I told him that TRW has had some very bad experiences with unions in the past, and that was all inside of the office.

* * * *

## APPENDIX O — EXCERPTS FROM TRIAL TRANSCRIPT OF ROBERT DAVIS

[Commencing at page 266]

* * *

Q Why is it important that you negotiate with each other roughly a year in advance of expiration?

A Well, projects and programs that we deal with are usually a few model years in advance. So things that we're working on the design and new builds, it kind of keeps it rolling on a smooth plane instead of waiting until the last minute and having new jobs that would come in maybe a year or two later going out for bid to other customers.

Q Is TRW a significant customer for you, that is to say, for Contech?

A Yes, they are.

Q Okay. Can you estimate how much of the production capacity of each of the plants is devoted to TRW work?

A Within Plant 3, it's roughly, at that time, 90 percent; and in Plant 1, maybe — and I'm guessing — maybe 15 percent.

MR. KOK: No further questions.

* * * *

## APPENDIX P — EXCERPTS FROM TRIAL TRANSCRIPT OF SHIRLEY STROUD

[Commencing at page 108]

* * *

Q BY MR. FAYETTE: Did you attend any meetings in December in the conference room where the voting took place?

A Yes, I did.

Q And were these meetings held on company time?

A Yes.

Q Who was present for the company?

A Usually Joe Barry and Brad Farver, Duane Weber and Steven Nunez.

Q Now, did management officials at these meetings ever discuss TRW's position on having Contech build its parts in connection with this Union organizing drive?

A Yeah, they almost made it known that TRW didn't want us to be unionized.

Q What did they say?

A Well, you have already heard testimony earlier about, you know, it was usually Brad or Joe that would talk about the fact that TRW — the main thing that I remember what

*Appendix P*

Joe said about TRW is that they wouldn't sign any more contracts with us, and [109] they didn't want any long-term contract signed until after our election.

* * * *

## APPENDIX Q — MEMO DATED NOVEMBER 21, 1994, EXHIBIT J4WW

Memo

To: Bob D., Jim B., Troy A. Date: 11-21-94

Subject: Phone conversation with Walt Kneuer today

From: G. Walker

C.C. Joe B., Brad F., Mark Hunsberger, Brian S., Jeff S.

Walt Kneuer, TRW General Manager, called today to express his concerns about the future of the Dowagiac operations and our ability to supply the product they need.

His two major concerns are: 1. why didn't we inform him sooner of the union problem in Dowagiac and the potential threat to production of his parts, and 2. we're two days away from shutting down his customer's production lines in some cases because of current production problems.

As for the union threat, I told him we had problems in the past but nothing this serious since the early 70's. I told him we had the best in legal advise to fight the organizing activity and that I was confident we would defeat the union, however I told him we have a real battle on our hands.

I said I knew that Latrobe Die Casting of Latrobe Pennsylvania was the major die casting supplier to TRW in the 1970's and early 80's. A strike at Latrobe Die Casting, Latrobe Pennsylvania, in the late 70's led that company to bankruptcy in the 1980's. Pace Die Casting took over that

business and eventually lost it to CONTECH. If it wasn't for the strike in the 1970's Latrobe might still be the supplier today instead of CONTECH! So much for the thinking that unions protect jobs.

He asked me what happened in Dowagiac to create such a state of affairs. I told him that the condition of the tooling was the root cause of employee unrest. The number of shots on the dies in production is well beyond the acceptable. Bad dies result in quality, delivery, overtime and unhappy people. Pressure to produce caused people to believe management doesn't care about them. Introducing new human resource policy without sufficient preparation caused confusion and hurt employee moral. The Labor Day overtime incident would not have occurred if we had sufficient approved tooling.

I told him we're working hard to build the trust of the people, which we lost as the result of numerous management changes. I said we were getting it back a little at a time, but had much work left to do.

Finally, I described the efforts of several people including Maurie and Steve Corbit assisting in the process of tooling approval. Brian S. and Diane H. helping on the IR answers. Babu is helping improve metal handling and systems. Brad F. is personally monitoring the tooling sampling approval process.

J4WW

## APPENDIX R — EXCERPTS FROM SUPPLY AGREEMENT DATED JULY 15, 1991, EXHIBIT J4ZZ

[1] SUPPLY AGREEMENT

This Agreement (the "Agreement") is entered into this 15th day of July 1991 by and between TRW Inc., on behalf of its Steering & Suspension Systems, North America unit ("Purchaser") and Sealed Power Technologies Limited Partnership, on behalf of its Contech Division ("Seller").

*Recitals*

A. Purchaser is in the business of manufacturing and selling rack and pinion steering gears.

B. Seller is in the business of manufacturing aluminum die cast housings (the "Products") for rack and pinion steering gears.

C. Purchaser wishes to source a portion of its requirements for Products, designed and manufactured to Purchaser's specifications, from Seller, and Seller wishes to sell Products meeting such specifications to Purchaser, in accordance with the terms and conditions set forth below.

*Terms and Conditions*

NOW, THEREFORE, in consideration of the premises and of other good and valuable consideration, and intending to be legally bound hereby, Purchaser and Seller agree as follows:

*Appendix R*

1. *Contract Period*: The initial term of this Agreement will be from the date of this Agreement through December 31, 1995 (the "Initial Term"), renewable for two 5 year periods thereafter at the option of Purchaser (the Initial Term and any exercised renewal period being referred to as the "Contract Period").

2. *Purchase Obligation*. During the Initial Term and subject to the terms of this Agreement, Purchaser will make the following minimum purchases of, but not to exceed, its requirements for Products from Seller:

| Calendar Year | Minimum Purchases ($Millions) |
|---|---|
| 1991 | – per recent orders – |
| 1992 | 10.9 |
| 1993 | 12.1 |
| 1994 | 12.9 |
| 1995 | 12.0 |

[2] This commitment is contingent upon Seller remaining competitive with respect to price, quality and delivery, as determined by periodic benchmarking and market testing. For purposes of this commitment, actual purchases will be adjusted to eliminate the purchase volume effect of actual aluminum costs being different (higher or lower) than $0.80 per pound.

In the event Purchaser exercises any renewal option, Purchaser and Seller will agree upon the minimum purchases at the outset of any such additional 5 year period.

*Appendix R*

3. *Capacity*: Seller will install and/or maintain sufficient capacity to fill, and will accept, Purchaser's orders for Products up to at least 110% of the minimum purchase volumes stated in Section 2 above.

4. *Prices*: Initial Prices will be as agreed by the parties and in effect on June 30, 1991. Prices will be adjusted quarterly to reflect changes in material costs. Contech will be entitled to annual price increases to reflect inflationary production cost increases to the extent they exceed 5% annually as measured by the change in the finished goods Producer Price index ("PPI") for the twelve months ending October 31 each year. The price adjustment for each Product will be equal to the excess percentage increase in the PPI multiplied by Seller's value added to that Product. For purposes of this calculation, "value added" shall mean the price less Seller's cost of materials for the Product. Price adjustments will become effective on January 1 of the following year.

5. *Rebate*. A volume rebate will be paid to Purchaser by Seller within 30 days after the close of each calendar year based on Purchaser's purchases of Products during that year in accordance with the following terms:

(a) *Qualifying Purchases*. For purposes of the rebate calculation, "Qualifying Purchases" will:

(1) include only purchases of Products which were in production for a minimum of 12 months before the end of the relevant calendar year;

(2) exclude the purchase price of any returned Products; and

(3) be adjusted to eliminate the purchase volume effect of actual aluminum costs being different (whether higher or lower) than $.80 per pound.

(b) *Amount of Rebate.* The rebate payable for a calendar year will equal the sum of:

* * *

[5] (2) If the sale is to an unrelated third party, 20% of the excess of the sale price over the allocated debt outstanding as of the closing date of the sale.

(3) In the event of a sale of Contech to a third party, payment of the Incentive Payment will be made within 30 days after the closing date of such sale.

(4) Notwithstanding the foregoing paragraphs (1) and (2), in the event a sale of Contech occurs after December 31, 1995 and Purchaser has not exercised its option to renew this Agreement, the amount of the Incentive Payment payable to Purchaser will be the amount calculated as owing on December 31, 1995, together with interest.

*Appendix R*

7. *Payment Terms*: Net 40 days.

8. *Quality*: Seller will use its best efforts to achieve "certified supplier status" as defined in the Purchaser's Supplier Quality Manual, a copy of which has been supplied to Seller. In addition, Seller will complete installation of the Zeiss-compatible CMM coordinate measurement machine on or before August 1, 1991.

9. *Interface*: Seller will complete EDI installation and will establish a CAD graphics link with Purchaser on or before August 1, 1991.

10. *Minimum Inventory*: Seller will maintain a minimum of 5 days supply of finished goods inventory at all times.

11. *Cost Control*: Purchaser and Seller will establish a joint team to identify and implement cost reduction and design improvement ideas. Without limiting the foregoing, Purchaser and Seller will work collectively to reduce the cost of die cast tooling and Seller will use leveraged buying and hedging to achieve the lowest possible aluminum prices. Any cost reductions resulting from the activities described in this section, or similar activities, will be shared 50/50 by Purchaser and Seller.

12. *Terms and Conditions of Purchase*: Purchaser's standard Terms and Conditions of Purchase, a copy of which is attached as Appendix B, will apply to all purchases of Products pursuant to this Agreement and are incorporated into this Agreement by this reference. If any of such Terms

and Conditions of Purchase conflict with the terms stated in this Agreement, this Agreement will govern.

[6] 13. *Preprinted Forms*: Throughout the performance of this Agreement, the parties may use their preprinted forms (including, without limitation, purchase order and order acknowledgment forms) for their convenience, but any terms on such forms other than the quantities and delivery dates will not be deemed a part of the agreement between the parties.

14. *Force Majeure*: Neither party will be responsible or liable for a delay or default in the performance of duties under this Agreement or any individual order hereunder if such delay or default is caused by extraordinary events beyond that party's control, including, but not limited to, strikes and acts of God. The parties agree and undertake to use their best efforts to minimize the influences of such force majeure on their respective duties under this Agreement or individual orders hereunder.

15. *Status of the Agreement*. This Agreement does not and is not intended to create a joint venture or partnership between Seller and Purchaser, does not transfer an interest in Seller or in any of its assets or liabilities to Purchaser and does not grant any interest in the profits or losses of Seller to Purchaser.

16. *Rights of Purchaser*. Purchaser will have only the rights of a creditor, equal to other trade creditors, under this Agreement. Purchaser will have no right to participate in any management decisions of Seller or Contech.

Purchaser will not be liable for any loss or any debts of Seller or any negative Net Value of Contech.

17. *Purchaser's Right to Information.* Purchaser will be entitled to receive from Seller no later than 45 days after the end of each quarter unaudited quarterly financial statements of Contech and will be entitled to discuss the finances and accounts of Contech annually with its Manager of Financial Control and Planning.

18. *Applicable Law*: This Agreement will be governed by and construed in accordance with the internal substantive laws of the State of Michigan, except where the substantive laws of another jurisdiction mandatorily apply.

19. *Assignment*: Neither party may assign this Agreement or any of its rights or duties under this Agreement without the prior written consent of the other party, provided however, that either party may assign this Agreement to a successor in interest by amalgamation, merger, consolidation or the acquisition of substantially all of the assets of the division of that party which is primarily responsible for performance of this Agreement.

[7] 20. *Notices*: All notices, requests and other communications hereunder (other than purchase orders, order acknowledgment forms and other normal correspondence concerning the purchase and sale of Products which will be addressed and delivered pursuant to customary procedures) will be in writing and will be deemed to have been duly given at the time of receipt if delivered by hand, 2 days after communicated by electronic

transmission and confirmed in writing on the following day, 1 day after sent by overnight courier, or, if mailed, 5 days after mailing registered or certified mail, return receipt requested, with postage prepaid:

*If to Purchaser:*

TRW Steering & Suspension Systems,
North America
34201 Van Dyke Avenue
Sterling Heights, Michigan 48312
Telefax: 313-977-5456
Attention: Vice President & General Manager

*With a copy to*:

TRW Inc.
1900 Richmond Road
Cleveland, Ohio 44124
Telefax: 216-291-7070
Attention: Secretary

*If to Seller*:

Sealed Power Technologies Limited
Partnership, Contech Division
Westwood Office Park
Kalamazoo, Michigan 49009
Telefax: (616) 375-8926
Attention: Gary Walker
Vice President and General Manager

provided, however, that if either party designates a different address by notice to the other given as provided above, then to the last address so designated.

21. *Amendments*: This Agreement may not be amended or modified except by a writing signed by authorized representatives of both parties.

22. *No Third Parties*: Neither this Agreement nor any provision set forth herein is intended to, or will, create any rights in or confer any benefits upon any person other than the parties hereto.

[8] **IN WITNESS WHEREOF,** TRW Inc. and Sealed Power Technologies Limited Partnership have each caused this Agreement to be executed by their duly authorized representatives, all as of the date on the attached Amendment to the "Agreement".

**TRW INC.**

By: s/ Gary S. Mahon
Title:

**SEALED POWER TECHNOLOGIES LIMITED PARTNERSHIP**

By: Gary G. Walker
Title:

*Appendix R*

April 15, 1993

Amendment to the "Agreement"

This "Agreement", effective April 15, 1993, amends the "Agreement" entered into the 15th day of July 1991 by and between TRW Inc., on behalf of its Steering and Suspension Systems, North America Unit (Purchaser) and Sealed Power Technologies Limited Partnership, on behalf of its Contech Division (Seller).

This document is to amend Item number 5 (Rebate)

(b) *Amount of Rebate.* The rebate payable for a calendar year will equal the sum of:

(1) Six percent (6%) of the amount of all Qualifying Purchases exceeding $5,000,000 but not exceeding $7,000,000; and

(2) Eight percent (8%) of the amount of all Qualifying Purchases exceeding $7,000,000 but not exceeding $9,000,000; and

(3) Ten percent (10%) of the amount of all Qualifying Purchases exceeding $9,000,000 but not exceeding $14,500,000.

Total yearly rebate not to exceed $830,000. Rebates to be paid on a quarterly basis based on calendar year to date purchases. Payment to be made 20 days after the end of each quarter for the first three quarters, 50 days at year end. Contech will share cost data when applicable.

Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

No. 98-1981

# In the Supreme Court of the United States

CONTECH DIVISION, SPX CORPORATION, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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28 pp

## QUESTION PRESENTED

Whether the court of appeals erred in enforcing the National Labor Relations Board's order that rejected petitioner's challenge to the Board's earlier decision setting aside a representation election based on its finding that petitioner's statements and conduct during the election campaign contained the threat of reprisal.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Statement | 2 |
| Argument | 8 |
| Conclusion | 12 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969) | 2, 3, 9, 10 |
| *NLRB* v. *Pentre Elec., Inc.*, 998 F.2d 363 (6th Cir. 1993) | 7 |
| *NLRB* v. *Tennessee Packers, Inc.*, 379 F.2d 172 (6th Cir.), cert. denied, 389 U.S. 958 (1967) | 8 |
| *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951) | 10 |
| *US Airways, Inc.* v. *National Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999) | 10, 11 |


Statutes:


| | |
|---|---|
| National Labor Relations Act, 29 U.S.C. 151 *et seq.*: | |
| § 8, 29 U.S.C. 158 | 8 |
| § 8(a)(1), 29 U.S.C. 158(a)(1) | 6 |
| § 8(a)(5), 29 U.S.C. 158(a)(5) | 6 |
| § 8(c), 29 U.S.C. 158(c) | 2, 7, 8, 9, 10, 11 |
| § 9, 29 U.S.C. 159 | 8 |
| Railway Labor Act, 45 U.S.C. 151 *et seq.* | 10 |

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 164 F.3d 297. The decision and order of the National Labor Relations Board finding that petitioner had engaged in unfair labor practices following a second representation election (App., *infra*, 1a-7a) is unreported, but the decision is noted at 322 N.L.R.B. No. 111. The Board's decision and certification of representative (Pet. App. 40a-42a), and the reports of the regional director and the hearing officer (Pet. App. 60a-67a, 70a-107a), are unreported. The Board's earlier decision in the underlying representation proceeding (Pet. App. 22a-39a), wherein it set aside the initial election and directed that the second election be held, is reported at 320 N.L.R.B. 219.

## JURISDICTION

The judgment of the court of appeals was entered on December 30, 1998. A petition for rehearing was denied on March 11, 1999 (Pet. App. 68a-69a). The petition for a writ of certiorari was filed on June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Section 8(c) of the National Labor Relations Act (Act), 29 U.S.C. 158(c), provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit.

Under Section 8(c), an employer may "communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). The employer "may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." *Ibid.* "If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction

based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment." *Ibid.*

2. a. Petitioner produces automotive parts for the Ford Motor Company, TRW, and other automotive suppliers. Pet. App. 3a. On November 14, 1994, the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (Union) filed a representation petition with the National Labor Relations Board (Board) seeking an election among the production and maintenance employees at petitioner's two plants in Dowagiac, Michigan, on whether to certify the Union as the employees' representative. *Ibid.*

Pursuant to a stipulated election agreement, a representation election was conducted on January 12, 1995. Pet. App. 7a. The Union lost by a vote of 196 to 154. *Ibid.* The Union filed with the Board objections to the election alleging, *inter alia*, that, prior to the election, petitioner had "conducted a campaign of fear and intimidation through predictions of violence, strikes, loss of customers and economic detriment which [petitioner] insinuated would inevitably result from a union victory," and had threatened to "go out of business, close the plant or that customers would remove work if [the Union] won the election." *Ibid.*

b. On December 19, 1995, the Board sustained the Union's objection, set aside the results of the election, and directed that a second election be conducted. Pet. App. 22a-39a. Applying the principles set forth in *Gissel Packing*, *supra*, the Board concluded that "parts of [petitioner's] speeches, statements, and other communications had a reasonable tendency to create and reinforce an atmosphere of fear among the employees

that a union victory could result in loss of work, jobs, and customers, and in-plant closure." Pet. App. 30a.

Specifically, the Board agreed with findings by the hearing officer that petitioner's failure to explain to the Union the reason for the loss of some of their Ford company production work, combined with petitioner's distribution of an article to employees about loss of Ford production work by another company that had been unionized and struck, tended to suggest to the Union that its loss of the Ford work "may have been related to the presence of the Union." Pet. App. 30a. The Board also found that petitioner's managers told employees that the Union and the election were to blame for postponement of contract renewal negotiations with TRW. The Board further found that, together with comments by another manager that TRW was trying out alternative suppliers, such comments by company officials "in the context of [petitioner's] campaign against the Union, would reasonably lead the employees to conclude that TRW's relationship with [petitioner] was in jeopardy because of the Union, and that the outcome of the election could determine whether the TRW contract was renewed." *Id.* at 31a.[1]

Because these statements "gave the employees reason to believe that TRW and Ford were already retreating from their relationship with [petitioner] because of the Union," a speech by a company manager two days before the election emphasizing the shut down of unionized plants owned by petitioner's parent company "had a reasonable tendency to make the em-

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[1] Moreover, petitioner did not explain to the employees that product quality and delivery issues were contributing factors in TRW's hesitancy to enter into a new production agreement with petitioner. Pet. App. 5a, 26a.

ployees fear that a union victory could result in a loss of work for [petitioner]." Pet. App. 28a-29a; *id.* at 31. The Board found that the impression conveyed to employees by those manager comments "was further amplified" by the highly visible inspection tour of petitioner's facilities by a TRW official, just a few days before the election "accompanied by an entourage of [petitioner's] managers and supervisors." *Id.* at 32a, see also *id.* at 29a. The Board found that those events also "gave added weight" to a letter to the employees by petitioner's president, three days before the election, expressing concern that petitioner's customers "would become nervous about the Union's presence." *Id.* at 32a; see also *id.* at 28a. The Board found that those events also "provided additional context" for a statement by another of petitioner's managers that the outcome of the election could affect petitioner's relationship with TRW. *Id.* at 32a.

The Board concluded that petitioner thereby created an atmosphere in which the statements "would reasonably have been understood by [employees] as an implicit prediction that work and jobs would be lost if the Union won the election." Pet. App. 32a. The Board found that the record did not establish that the prediction was based on objective facts beyond petitioner's control. Thus, the prediction constituted "an objectionable threat of lost customers, warranting the setting aside of the election." *Ibid.*; see also *id.* at 33a. Accordingly, the Board directed that a second election be conducted among the appropriate unit of petitioner's employees. *Id.* at 38a-39a.

3. a. Pursuant to the Board directive, a second representation election was held on March 13, 1996. Pet. App. 40a. The Union won by a vote of 184 to 150. *Ibid.* Petitioner filed with the Board objections to conduct

that allegedly affected the results of the second election alleging, *inter alia*, that the Union, through various campaign documents, had misrepresented why the second election was being held, had falsely stated that petitioner had made misrepresentations to the employees, and had implied that customers would be lost if the Union were not selected as the bargaining representative. *Id.* at 62a-63a.

The Board adopted findings and recommendations of the regional director (Pet. App. 60a-67a), rejected petitioner's objections, and certified the Union as the employees' bargaining representative. *Id.* at 40a-42a.

b. Despite the Board's certification, petitioner refused to bargain with the Union. Pet. App. 3a. Acting on a charge filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner's refusal constituted a violation of Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). Pet. App. 3a, 14a. On summary judgment, the Board concluded that petitioner had violated the Act as alleged, and ordered it to bargain with the Union. App., *infra*, 5a. The Board rejected petitioner's attack on the validity of the certification, which was based on petitioner's objection to the holding of the second election. *Id.* at 2a. The Board found that all representation issues raised by petitioner "were or could have been litigated in the prior representation proceeding," and that petitioner had not raised any representation issue "that is properly litigable in this unfair labor practice proceeding." *Ibid.*

c. The court of appeals enforced the Board's order. Pet. App. 1a-21a. The court concluded that substantial evidence supports "each of the Board's decisions in question." *Id.* at 3a.

The court rejected petitioner's argument, based primarily on *NLRB* v. *Pentre Electric, Inc.*, 998 F.2d 363 (6th Cir. 1993), that the Board "improperly set aside the results of the first election because the statements of [petitioner's] representatives were truthful and entitled to protection under Section 8(c) of the Act, 29 U.S.C. 158(c)." Pet. App. 17a. The court emphasized that, "[u]nlike *Pentre*, which involved an alleged unfair labor practice arising from an employer's pre-election conduct, the present matter involves the Board's broader discretion to set aside the results of an election," and that the Board may set aside an election "even though an employer's conduct does not rise to the level of an unfair labor practice." *Id.* at 18a (citation omitted). The court further explained that "even if we were to apply Section 8(c)'s language to the election context, * * * the employer's expression of its views is protected only 'if such expression contains no threat of reprisal.'" *Ibid.* The court explained that petitioner

> crossed the line in the present case * * * in the linking of such literature [about job losses elsewhere] to its own intimidating conduct in transferring production of the Ford part to another * * * plant without explanation, in its timing of the quality-inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials.

*Id.* at 18a-19a. The court noted that the Board "in effect concluded that [petitioner's] overall conduct contained the threat of reprisal," and that the court could not say that there was an absence of substantial evidence to support the Board's findings. *Id.* at 19a.

The court of appeals also concluded that "substantial evidence supports the Board's determination that the circumstances surrounding the second election allowed the employees to exercise a free and fair choice in deciding to be represented by the [Union]." Pet. App. 19a. Accordingly, the court upheld the Board's decision to certify the result of the second election. *Id.* at 19a-21a.

## ARGUMENT

Petitioner does not challenge the court of appeals' decision insofar as it upheld the Board's certification of the Union as the employees' bargaining representative based on the result of the second election held on March 13, 1996. Petitioner challenges the court's decision only insofar as it affirmed the Board's action in setting aside the first election held on January 12, 1995.

1. Petitioner contends (Pet. 7-9) that review by this Court is warranted because the court of appeals erroneously failed to apply Section 8(c) of the Act in determining whether petitioner's anti-union campaign warranted setting aside the result of the first election. Petitioner disregards, however, the fact that, although the court suggested that Section 8(c) is applicable only to unfair labor charges and not to decisions setting aside elections,[2] the court nonetheless proceeded to

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[2] In so noting, the court was merely referring to the settled principle that the Board has authority under Section 9 of the Act, 29 U.S.C. 159, to set aside an election for conduct by a party to the election that impairs employee free choice, even though such conduct does not amount to an unfair labor practice under Section 8 of the Act, 29 U.S.C. 158. See Pet. App. 18a (citing *NLRB* v. *Tennessee Packers, Inc.*, 379 F.2d 172, 181 (6th Cir.), cert. denied, 389 U.S. 958 (1967)). The question whether the Board could properly set aside an election based on speech, standing alone, that does not contain a "threat of reprisal or force or promise of benefit," 29

review the Board's setting aside of the first election under the standards of Section 8(c).

The court explained that, under the language of Section 8(c), an "employer's expression of its views is protected only 'if such expression contains no threat of reprisal.'" Pet. App. 18a. The court concluded that, "where [petitioner] crossed the line" demarcated by Section 8(c), and therefore fell outside the protective ambit of that provision, was in linking its literature about job losses elsewhere that resulted from unionization "to its own intimidating conduct in transferring production of the Ford part to another * * * plant without explanation, in its timing of the quality-inspection tour by TRW officials, in its selective removal of union literature from the plant lunchrooms, and in the misleading content of certain pre-election statements made by its own officials." *Id.* at 18a-19a. The court found that, therefore, there was substantial evidence to support the Board's conclusion, in effect, that petitioner's "overall conduct contained the threat of reprisal, thus denying the employees a free and fair election choice." *Id.* at 19a. See also *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969) (to fall within protection of Section 8(c), expression of views must not contain any "threat of reprisal or force").

Accordingly, there is no merit to petitioner's claim (Pet. 8-9) that review by this Court is warranted to address a ruling by the court of appeals that the Board may overturn an election based upon "employer state-

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U.S.C. 158(c), is not presented here because, as discussed above, the court specifically found, as did the Board, that petitioner engaged in speech and conduct that conveyed to the employees a threat of reprisal, including plant closure, in the event that the Union won the first election.

ments that do not violate Section 8(c) and are protected by the first amendment." Pet. 8. The court of appeals made clear that the employer statements and conduct at issue do violate Section 8(c) because they "crossed the line" and contained the threat of reprisal. Pet. App. 18a-19a. Indeed, petitioner acknowledges elsewhere (see Pet. 11) that the court of appeals analyzed the circumstances surrounding the first election campaign under the Section 8(c) standard and stated that its conclusion would stand if Section 8(c) were applied.

Petitioner's related suggestion (Pet. 12-18) that there was no record evidence to support the conclusion that petitioner's statements and conduct contained the threat of reprisal, in violation of Section 8(c), raises no issue warranting further review by this Court. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

2. Contrary to petitioner's claim (Pet. 9), the decision below does not conflict with *US Airways, Inc.* v. *National Mediation Board*, 177 F.3d 985 (D.C. Cir. 1999). In *US Airways*, the court concluded that the principles of *Gissel Packing*, *supra*, apply to employer campaign speech in elections conducted under the Railway Labor Act, 45 U.S.C. 151 *et seq.* 177 F.3d at 991. Applying *Gissel Packing*, the court concluded that the National Mediation Board (NMB) had issued an order that included two provisions that prospectively restrained US Airways from making, during a rerun election campaign, statements that would be protected under *Gissel Packing*. *Id.* at 992-994. The court emphasized that one provision applied to statements merely of the employer's views about unionism or a particular union that did not contain the threat of reprisal (*id.* at 993), and the other provision applied to statements that included objective predictions, not

"subjective predictions * * * such as a bare assertion that temporary layoffs could occur if the union is elected" (*ibid.*).[3]

Thus, unlike the instant case which involved speech combined with conduct to create circumstances that contained the threat of reprisal to employees, *US Airways* involved only discrete types of pure speech that the court found unobjectionable under *Gissel Packing*. 177 F.3d at 992-994; see also *id.* at 992 (distinguishing, and not addressing propriety of, employer's campaign prior to first election, which was "a potpourri of speech and conduct"). The *US Airways* court emphasized that, because the two provisions of the NMB's order at issue there regulated pure speech, its analysis was simplified because there was no need "to confront the situation where an employer's otherwise protected speech becomes unprotected because the employer also engages in conduct tending to coerce." *Id.* at 992. As the *US Airways* court fully recognized, where, as here, the employer's "overall conduct contained the threat of reprisal," the employer's campaign is not protected by Section 8(c) of the Act. See *id.* at 993.

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[3] The NMB's order precluded the employer from conducting a campaign "which indicate[s] a pre-existing committee is, or should be, a substitute for the collective bargaining representative," or "indicate[s] that the certification of a labor organization as the representative of the employees will lead to the termination of a pre-existing committee." 177 F.3d at 992. The court found that the former kind of campaign statement contains no threat of reprisal, and that the latter kind of statement would be based on "[an] objective circumstance stem[ming] from law," namely, that "[w]here the NMB has certified a representative for a carrier's employees, the [Railway Labor Act] imposes on the carrier the duty to 'treat with' that certified representative and none other in negotiating working conditions." *Id.* at 993. No such employer statements are involved in the present case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*Solicitor General*

FREDERICK L. FEINSTEIN
*General Counsel*

LINDA SHER
*Associate General Counsel*

NORTON J. COME
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*National Labor Relations Board*

AUGUST 1999

**APPENDIX**

Case 7-CA-39061

CONTECH DIVISION, SPX CORPORATION *AND* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), AFL-CIO.

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[December 9, 1996]

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**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

Pursuant to a charge filed on October 4, 1996, the General Counsel of the National Labor Relations Board issued a complaint on October 8, 1996, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-20485. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On November 4, 1996, the General Counsel filed a Motion for Summary Judgment. On November 5, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

In its answer, the Respondent admits its refusal to bargain, but denies that the Union is the exclusive bargaining representative of the unit employees and attacks the validity of the certification on the basis of its objection to the holding of a second election in the representation proceeding. The Respondent contends that the second election was improperly and wrongfully ordered and is thus invalid.[1]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

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[1] 320 NLRB No. 52 (1995).

[2] Member Fox did not participate in the underlying representation proceeding. However, she agrees with her colleagues that the Respondent has raised no new issues in this "technical" 8(a)(5) proceeding warranting a hearing.

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and places of business in Dowagiac, Michigan, has been engaged in the manufacture and nonretail sales of automotive parts. During the 12-month period ending December 31, 1995, the Respondent, in conducting its business operations described above, sold and shipped from its Dowagiac, Michigan facilities goods valued in excess of $50,000 directly to points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. *The Certification*

Following the second election held on March 13, 1996, the Union was certified on August 5, 1996, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

### B. *Refusal to Bargain*

Since August 20, 1996, and September 24, 1996, the Union has requested the Respondent to bargain and, since September 30, 1996, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By refusing on and after September 30, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Con-*

*struction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

**ORDER**

The National Labor Relations Board orders that the Respondent, Contech Division, SPX Corporation, Dowagiac, Michigan, its officers, agents, successors, and assigns, shall

**1. Cease and desist from**

(a) Refusing to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees employed by the Respondent at its facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facilities in Dowagiac, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 4, 1996.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 9, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Sarah M. Fox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production and maintenance employees employed by us at our facilities located at 51241 M-51 North, Dowagiac, Michigan, but excluding all office clerical employees, guards and supervisors as defined in the Act.

CONTECH DIVISION, SPX CORPORATION